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UNITED STATES' *DE NOVO* PART 417 REVIEW OF IMPERIAL IRRIGATION DISTRICT'S 2003 WATER ORDER

IMPERIAL IRRIGATION DISTRICT "*DE NOVO*" 2003 PART 417 BRIEF

TABLE OF CONTENTS

Page

I. OVERVIEW 1

II. IID'S POSITION REGARDING THIS PART 417 REVIEW 2

A. IID's Beneficial Use 3

1. A Short History Of IID, Its Water Rights, And The Events Leading Up To This Proceeding 3

2. IID's Historic Water Use 16

3. IID's Water Use And Tailwater Are Reasonable 18

4. State Law And The Part 417 Factors Show That IID's Beneficial Use Is Reasonable 23

a. Comparison Of IID With Other Water Users 25

b. Possible Reduction Of Tailwater 27

c. Interior's Theories Are Unproven 32

d. IID's Farming Is Of Major Value To The State And The Region 37

B. Part 417 Itself Is Invalid 39

C. This *De Novo* Part 417 Process Is Legally Defective 40

1. This *De Novo* Part 417 Process Violates IID's Due Process Rights And Violates Part 417 41

a. No Consultation Provided 41

b. No Cross-Examination Allowed 45

c. No Discovery 49

d. Insufficient Time 50

e. Not Prospective For Following Year 51

f. Singling Out IID Without Concurrent Action For Other Contractors 52

g. A Neutral Decision-Maker Is Required 54

Page

2. This *De Novo* Part 417 Review Cannot Ignore State Law 61

D. Other Considerations 72

1. Other Contractors' Beneficial Use 72

a. Interior Has Historically Ignored MWD, CVWD, And Other Colorado River Contractors 73

b. MWD And CVWD Have Ample Opportunity To Conserve Water And/Or Reduce Their Water Demand 74

c. MWD's Authority To Regulate 82

d. CVWD's Authority To Regulate 86

2. Environmental Issues 89

3. Interior's Own Stated Goals Are Thwarted By Targeting IID 94

III. CONCLUSION 97

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. California Water and Telephone Co.
(1946) 29 Cal.2d 466 ..... 19, 24

American Cyanimid Co. v. F.T.C.
363 F.2d 757 (6th Cir. 1966) 60

Amos Treat & Co. v. Securities Exchange Commission
306 F.2d 260 (D.C. Cir. 1962) 60

Arizona v. California
373 U.S. 546 (1963) 69, 70

Arizona v. California
376 U.S. 340 (1964) 14

Arizona v. California
460 U.S. 605 (1983) 71, 72

Barnes v. Sabron
10 Nev. 217 (1875) 65

Barrows v. Fox
(1893) 98 Cal. 63 30

Barstow v. Mojave Water Agency
(2000) 23 Cal.4th 1224 71

Brooks v. Outboard Marine Corp.
234 F. 3d 89 (2nd Cir. 2000) 36

Brown v. Parker Hannifin Corp.
919 F. 2d 308 (5th Cir. 1990) 36

Bryant v. Yellen
447 U.S. 352 (1980) 8

California v. United States
438 U.S. 645 (1978) 62

Cammarano v. United States
358 U.S. 498 (1959) 43

Campanale & Sons, Inc. v. Evans
311 F.3d 109 (1st Cir. 2002) 41

Central Arizona Irr. and Drainage Dist. v. Lujan
764 F.Supp. 582 (D.Az. 1991) 66

Page(s)

City of El Paso v. Reynolds
563 F.Supp. 379 (D. New Mexico, 1983) 70

Coffey v. Dowley Mfg., Inc.
187 F. Supp. 2d 958 (M.D. Tenn. 2002) 34, 35

Coffin v. Left Hand Ditch Co.
6 Colo. 443 (1882) 65

Crager v. The United States
25 Cl.Ct. 400 (1992) 61

Crowley v. District Court
108 Mont. 89, 88 P.2d 23 (1939) 19

Daubert v. Merrell Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993) 34, 35

Electromec Design and Development Co. Inc. v. NLRB
409 F.2d 631 (9th Cir. 1969) 50

Environmental Defense Fund
v. East Bay Mun. Utility Dist.
(1980) 26 Cal.3d 183 63

Erickson v. Queen Valley Ranch Co.
(1971) 22 Cal.App.3d 578 24

F.D.I.C. v. McSweeney
976 F.2d 532 (9th Cir. 1992) 42

Goldberg v. Kelly
397 U.S. 254 (1970) 48

Goshen Irrigation Dist. v. Pathfinder Irrigation
62 F.Supp.2d 1218 (D.Wyo. 1999) 70

Gould v. Maricopa Canal Co.
8 Ariz. 429 (1904) 65

Greene v. Babbitt
943 F.Supp. 1278 (W.D.Wash. 1996) 46, 47, 48

Greene v. Lujan
1992 WL 533059 (W.D.Wash. 1992) 47

Greene v. United States
996 F.2d 973 (9th Cir. 1993) 47

Grolier Inc. v. F.T.C.
615 F.2d 1215 (9th Cir. 1980) 60

Hague v. Nephi Irrigation Co.
16 Utah 421 (1898) 65

Page(s)

Hill v. King
(1857) 8 Cal. 336 64

In re Waters of Long Valley Creek Stream System
(1979) 25 Cal.3d 339 72

Joerger v. Pacific Gas & Electric Co.
(1929) 207 Cal. 8 30

Lopez v United States
129 F. Supp. 2d 1284 50

Lord v. Fairway Elec. Corp.
223 F. Supp. 2d 1270 (M.D. Fla. 2002) 34, 35, 36

Madera Irr. Dist. v. Hancock
985 F.2d 1397 (9th Cir. 1993) 46

Maricopa-Stanfield Irrigation & Drainage Dist. v. U.S.
158 F.3d 428 (9th Cir. 1998) 46

Mathews v. Eldridge
424 U.S. 319 (1976) 46, 47

McGhee Irrigating Ditch Co. v. Hudson
85 Tex. 587 (1893) 65

Mister Discount Stockbrokers, Inc. v. SEC
768 F.2d 875 (7th Cir. 1985) 49

Mohilef v. Janovici
(1996) 51 Cal.App.4th 267 50

Motl v. Boyd
116 Tex. 82 (1926) 65

National Resource Defense Council
82 F.3d at 834 (1996) 43

Nevada v. United States
463 U.S. 110 (1983) 46, 70, 71

New York Times Co. v. United States
403 U.S. 713 (1971) 62

NLRB v. Gala-Mo Arts, Inc.
232 F.2d 102 (8th Cir. 1956) 50

Northwest Forest Resource Council v. Glickman
82 F.3d 825 (9th Cir. 1996) 41

Platte Water Co. v. Northern Colorado Irrigation Co.
12 Colo. 525 (1889) 65

Page(s)

Sims v NTSB
662 F.2d 668 (10th Cir. 1981) 50

Springville v. Fullmer
7 Utah 450 (1891) 65

Thomas v. Guiraud
6 Colo. 530 (1883) 65

Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.
(1935) 3 Cal.2d 489 ..... passim

U.S. v. Alpine Land and Reservoir Co.
878 F.2d 1217 (9th Cir. 1989) 63

U.S. v. Alpine Land and Reservoir Co.
697 F.2d 851 (9th Cir.1983) 31, 63

U.S. v. Gila Valley Irrigation District
31 F.3d 1428 (9th Cir. 1994) 31, 32

U.S. v. State of Cal., State Water Resources
694 F.2d 1171 (9th Cir. 1982) 66, 67

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694 F.2d 1171 (9th Cir. 1982) 63

United States v. Tulare Lake Canal Co.
667 F.2d 713 (1982) 63

Van Bibber v. Hilton
(1890) 84 Cal. 585 64

Vansickle v. Haines
7 Nev. 249 (1872) 65

Williams v. Costa
(1921) 52 Cal.App. 396 64

Witherill v. Brehm
(1929) 207 Cal. 574 24

Zimmerman v. Oregon Department of Justice
170 F.3d 1169 (9th Cir. 1999) 42

Statutes and Regulations

16 United States Code Section 1531 ..... 91, 93

16 United States Code Section 470 ..... 91, 93

16 United States Code Section 470aa 91, 93

Page(s)

16 United States Code Section 668 .....91, 93
16 United States Code Section 703 91
16 United States Code Sections 4601-12 .....91, 93
16 United States Code Sections 661-667[e] 91, 93
16 United States Code Sections 703-711 93
25 United States Code Section 2011 44
25 United States Code Section 2011(b) 44
33 United States Code Section 1251 .....91, 93
42 United States Code Section 4321 .....91, 93
42 United States Code Section 4901 .....91, 93
42 United States Code Section 7401 .....91, 93
43 Code of Federal Regulations Part 10.3 43
43 Code of Federal Regulations Part 10.5 .....43, 44
43 Code of Federal Regulations Part 4 .....48, 49
43 Code of Federal Regulations Part 4 Section 4.1(b)(1) 48
43 Code of Federal Regulations Part 4 Subpart C 48
43 Code of Federal Regulations Part 4, Section 4.1(a) 48
43 Code of Federal Regulations Part 4, Section 4.107 48
43 Code of Federal Regulations Part 4, Section 4.111 48
43 Code of Federal Regulations Part 4, Section 4.115 48
43 Code of Federal Regulations Part 4, Section 4.119 48
43 Code of Federal Regulations Part 4, Section 4.123 48
43 Code of Federal Regulations Part 4, Section 4.200 49
43 Code of Federal Regulations Part 4, Section 4.400 49
43 Code of Federal Regulations Part 4, Sections 4.220-4.225 49
43 Code of Federal Regulations Part 4, Sections 4.230-4.236 49

Page(s)

43 Code of Federal Regulations Part 4, Sections 4.430-4.433 49

43 Code of Federal Regulations Part 4, Sections 4.434-4.439 49

43 Code of Federal Regulations Part 417 ..... passim

43 United States Code Section 617 8

43 United States Code Section 617d 69

5 United States Code Section 706(2)(D) 46

7 United States Code Section 4201 ..... 91, 93

California Civil Code Section 1411 64

California Fish and Game Code Section 1600 93

California Fish and Game Code Section 1900 93

California Fish and Game Code Section 2050 92

California Fish and Game Code Section 3511 93

California Fish and Game Code Section 4700 93

California Fish and Game Code Section 5050 93

California Fish and Game Code Section 5515 93

California Government Code Section 51200 93

California Land Conservation Act of 1965 (Williamson Act) 93

California Water Code Section 100 23

California Water Code Section 100.5 ..... 24, 25

California Water Code Section 109(a) 72

California Water Code Section 109-1 83

California Water Code Section 109-120 84

California Water Code Section 109-130 84

California Water Code Section 109-130.5 85

California Water Code Section 109-130.5(2)(b) 85

California Water Code Section 109-130.5(2)(c) 85

Page(s)

California Water Code Section 1240 65

California Water Code Section 13000 93

California Water Code Section 20529 8

California Water Code Section 22437 8

California Water Code Section 30000 86

California Water Code Section 30523 88

California Water Code Section 30575 88

California Water Code Section 30576 88

California Water Code Section 31001 87

California Water Code Section 31020 87

California Water Code Section 31021 ..... 87, 88

California Water Code Section 31022 87

California Water Code Section 31024 88

California Water Code Section 31025 87

California Water Code Sections 109-120 - 109-160 84

California Water Code Sections 109-25 83

California Water Code Sections 31000-32200 87

Metropolitan Water District Administrative Code Section 4210 85

Porter-Cologne Act 93

Public Resources Code Section 21000 92

State Scenic Highway Program, Streets and Highways Code Section 260 93

Stats. 1927, ch. 429, § 2, 695 83

Stats. 1949, ch. 274, § 1, 496 86

Stats. 1969, ch. 209, § 16, 493 83

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Page(s)

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Cal. Const. Art. XIV, § 3 66

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SWRCB Decision 1638 (1997) 25

SWRCB Water Rights Order 88-20 (1988) 92

I. OVERVIEW

In December of 2002, the Department of the Interior ("Interior") chose to reject Imperial Irrigation District's ("IID") water order for 3.1 million acre-feet ("MAF") of Colorado River water for calendar year 2003, cutting IID's order by approximately 300,000 AF. IID was the only Colorado River contractor ("Contractor") that had its water order reduced below the amount available to its priority. Water was instead awarded to junior rightholders Metropolitan Water District of Southern California ("MWD") and Coachella Valley Water District ("CVWD").

The stated basis for the reduction was Interior's newly formed belief that the 1979 Consent Decree in the Arizona v. California case, which established IID's present perfected rights, also somehow set a normal year maximum water amount (a "water duty").

IID filed suit against Interior in Federal District Court, and sought a preliminary injunction (United States District Court, Southern District of California Case No. 03-CV-0069; the "lawsuit"). IID's preliminary injunction motion was brought on the basis that Interior's legal interpretation of the 1979 Supreme Court Decree was in error. The Federal District Court agreed and granted the preliminary injunction. The Court ordered Interior to engage in a completely *de novo* review, and vacated all findings and conclusions of Interior. Interior has now implemented a process of its own design which it alleges meticulously complies with the requirements of 43 Code of Federal Regulations Part 417 et seq. ("Part 417"). Interior published notice of the *de novo* process in the *Federal Register* on April

29, 2003, at pp.22738-22739 ("Notice"). Under Court order, IID is now embarking on this *de novo* Part 417 review of its water use order for 2003.

II. IID'S POSITION REGARDING THIS PART 417 REVIEW

This Brief summarizes IID's overall position in this 2003 *de novo* Part 417 review. It supplements the extensive document submittal made by IID. To the extent IID does not address any particular point here that it earlier raised in the lawsuit (which is part of this proceeding, per the Notice), no waiver is intended, and those arguments are incorporated here.

The main points made in this Brief regarding the "*de novo*" Part 417 review are as follows:

- IID has a longstanding, large, and high priority right to use Colorado River water;
- IID is one of the most efficient irrigators in the Southwest, exceeding that of its neighbor to the north, the Coachella Valley Water District ("CVWD");
- IID has more tailwater than some districts, such as CVWD, because most of its soil is less permeable;
- IID has been unfairly singled out by Interior for review, with Interior ignoring CVWD and MWD, who both are junior to IID and have their own opportunities to conserve water and thus reduce their demand;

- Interior has refused to honor or accommodate the proper role of state law in reviewing IID's use;
- Interior is denying IID due process by prohibiting cross-examination, allowing no discovery, imposing unfair timeframes, and utilizing a biased initial decision-maker;
- Interior's process does not meticulously comply with the requirements of Part 417. It involves no consultation between Interior and IID and is not prospective as to allowance or disallowance of IID's Order;
- Interior ignores compliance with state and federal environmental laws;
- Interior values urban cosmetic uses over food and feed produced in an agricultural community totally dependent on a single water supply source; and
- Interior has refused to perform the truly unbiased and "*de novo*" review ordered by the Court.

A. IID's Beneficial Use

1. A Short History Of IID, Its Water Rights, And The Events Leading Up To This Proceeding

The background of IID and its water rights is necessary and helpful to this *de novo* Part 417 review. Though Interior should know these facts, Interior has to date ignored some of the key elements of this history.

IID is the sole source of water for the entire Imperial Valley of Southern California, located between the Arizona border on the east, Mexico on the south, the Salton Sea on the north, and San Diego County on the west. The almost half-million acres of farmed land in IID's service area grows an incredibly wide range of crops, from carrots and beets, to alfalfa, cotton, and melons. The perpetual sunshine and productive soil allow crops to be grown year-round, and they make IID a unique resource for California and the Nation. The agricultural production from the Imperial Valley exceeds $1 billion a year.

IID's predecessors originally appropriated Colorado River water in the late 1800's and delivered that water to their farms for decades before the advent of Interior. IID's longstanding water rights were established by the hard work and dedication of numerous farmer families, who suffered through extreme hardship to create the agricultural dynamo that is the Imperial Valley today. The appropriative rights which arose from those diversions and applications of water were established by state law and subject to the reasonable beneficial use limitation on appropriative rights prevalent in California and all jurisdictions of the arid West.

During the early 20th Century, when IID was first formed, IID was one of only a relatively few existing agricultural organizations in the seven Basin states diverting Colorado River water for irrigation. Urban use during this early period was not substantial. MWD, which now serves Los Angeles and San Diego, was not yet in operation. Cities such as Denver, Salt Lake City,

Las Vegas, Phoenix, and Tucson, were not significant factors in Colorado River water use.

For almost a century, IID has delivered irrigation water to the farmers in the Imperial Valley. Each customer irrigates his or her own land according to the practices deemed most efficient and productive, with overall use regulation by IID. The most prevalent, customary, historic, and current irrigation method has been gravity flow irrigation. A substantial portion of applied irrigation water results in water being taken in by the crops being grown. Another portion percolates through, and over, the soil, leaching out the salts which enter the Imperial Valley with the imported Colorado River water. Some irrigation applications are solely for a salt leaching function. Salty water resulting from the irrigation and leaching applications drains to the Salton Sea.

IID's downstream location renders the Colorado River water IID diverts particularly salty, because of salty return flows from upstream irrigators in all seven Basin states. Most soils in IID tend to be particularly dense and impermeable. Thus, enough water must be applied to leach, yet it cannot be left standing (by diking the end of the field) without scalding or other injury to the crops.

Gravity flow irrigation on less permeable types of soils, such as predominate in IID's service area, has customarily involved the creation of "tailwater" (called that because it runs off the "tail" or lower end of the field). Maximizing productivity without tailwater is often impossible. It is extremely difficult for any farmer to gauge and apply with

complete precision the optimal amount of water to each portion of his field at any given time. The use of too little water jeopardizes crop growth. There must be sufficient "opportunity time" for the plants to extract the water they need to grow. But, at the same time, the water cannot just sit on the surface without injuring growing crops. Therefore, tailwater has always been an inherent part of gravity flow irrigation in IID and in many other similar locales.

IID operates an extensive delivery system. It includes the 82-mile All-American Canal, plus 1,675 miles of other canals which serve about 5,600 headgates (gates at the "head" or high end of a field). In addition to the canals, IID manages 10 regulating reservoirs. The drainage system in the Imperial Valley has over 1,400 miles of drain ditches and another 33,600 miles of leach water tile drains which underlie cultivated fields. The flows from the surface and tile drains ultimately go into the New River or the Alamo River, or directly into the Salton Sea. Though IID operates the distribution system and the off-farm drainage collection system, tile drains and tailwater discharge structures belong to the land owners.

Water orders and deliveries by IID require substantial management effort. IID places orders each week with Interior for water from primary storage at Lake Mead. These orders are typically placed about five days before the beginning of the week in which the deliveries are to start. However, in order to more properly order the amount of water they actually need, farmers are allowed to order water from IID one to two days in advance of delivery. Therefore, IID has to estimate its water needs up to

10 days before the farmers' requests when placing its orders with Interior.

IID diverts water at Imperial Dam into the All-American Canal, then into the main canals and laterals, and then to headgates. Virtually the entire flow--from the diversion at Imperial Dam to delivery at the headgate to drainage into the Salton Sea--is by gravity. Once IID has diverted water into the All-American Canal, there is only a small amount of storage (0.1% of annual diversions) available to regulate delivery of the water supply within IID.

All headgate deliveries and tailwater outflow are measured at regular intervals during delivery periods by Zanjeros (ditch riders), who open and close headgates and adjust lateral canal checks and gates to deliver water orders at the specified times, places, and flow rates. Therefore, IID must estimate its water needs very carefully. Due to the many complexities of this gravity-driven, open canal delivery system, IID cannot perfectly control the water, even under ideal conditions, such that all deliveries are met without any water discharges at the end of the canals. Nonetheless, despite such unavoidable constraints, IID delivers over 90% of the Colorado River water it diverts to its users. The water that is not delivered includes losses from evaporation, seepage, and operational spills.

Drainage water from IID fields is collected by subsurface drains and surface drains that empty directly into the Salton Sea, or into the New and Alamo Rivers, which then eventually flow into the Salton Sea. The Salton Sea is below sea level and is at the lowest elevation in the Imperial Valley.

Operation of IID's main delivery canal system has evolved extensively over the years. Initially, the system was controlled manually by field personnel, who routed water on-site by electric powered gates or manual gate lifts. Beginning in the late 1950's, remote-control equipment was installed and operated through telephone lines, which provided better control along main canals. Water delivery equipment for the All-American Canal and for the upstream half of IID's main canals is now controlled remotely from IID Headquarters.

IID delivers Colorado River water under water rights that date back to the 1800's and are a product of state and federal law, and various contracts. IID's water rights are held in trust for landowners in its service area. Bryant v. Yellen, 447 U.S. 352, 371, fn.23 (1980); California Water Code §§ 20529 and 22437.

When the federal government decided to tame the Colorado River, various laws were enacted by Congress to apportion the use of the Colorado River among the western states through which it ran. Pursuant to the 1922 Colorado River Compact, the Boulder Canyon Project Act ("BCPA") of 1928 (43 U.S.C. § 617, et seq.), and the California Limitation Act,[1] California was apportioned 4.4 million acre-fee per year ("MAFY") from the Colorado River Lower Basin's allocation of 7.5 MAFY, plus 50% of any available surplus water. Under the BCPA, Interior was authorized to enter contracts for storage and delivery of water in and through the new federal facilities.

[1] Act of March 4, 1929; Ch. 16, 48th Sess.; Statutes and Amendments to the Codes, 1929, p. 38-39.

Though division among the states was accomplished by Congress, the intrastate division of California's 4.4 MAFY apportionment was accomplished by a contract among California's right holders and thereafter by separate, permanent water-delivery contracts between the Secretary and each California right holder that incorporated the contract among the right holders. On August 18, 1931, a number of existing California Colorado River users, including IID, and prospective users of Colorado River water, including CVWD and MWD, entered into the "Seven-Party Agreement." Under the Seven-Party Agreement, IID, CVWD, MWD, the Palo Verde Irrigation District ("PVID"), City of Los Angeles, City of San Diego and County of San Diego "expressly agreed to the apportionments and priorities of water of and from the Colorado River for use in California as set forth therein." IID agreed to modify its existing California-law originated water rights in quantity and priority to a third priority in the amount of 3.85 MAFY, minus the volume used by priorities 1 and 2, and to a sixth and seventh priority to any available surplus.

In the late 1930's Interior and MWD constructed Parker Dam and the Colorado River Aqueduct. As a leading historian has written, the new water from such projects "helped underwrite a future of massive growth" and, indeed, "obliterated any sense of restraint." Norris Hundley, Jr., *The Great Thirst: Californians and Water: A History* (Univ. Calif., Berkeley, 2001) at 231. During the next three decades, the population of the Southern California coastal plain increased two-and-a-half times. Urban growth was similarly promoted by projects such as the Colorado-Big Thompson and the Fryingpan-Arkansas, which supply Colorado

River water to Denver and other cities on the eastern slope of the Rockies. National Research Council, *Water Transfers in the West: Efficiency, Equity, and the Environment* (National Academy Press, Washington, D.C., 1992) at 138-145; Philip L. Fradkin, *A River No More: The Colorado River and the West* (Univ. Calif., Berkeley, 1981) at 112-13.

To implement the new federal role for the Colorado River, Interior not only entered into delivery contracts with those who had never used the Colorado River before, such as MWD, but also with those who had longstanding rights to it, such as IID.

On December 1, 1932, IID entered into its permanent water delivery contract with the Secretary (the "1932 Contract"). The 1932 Contract incorporated the provisions of the Seven-Party Agreement, as did all other California right holder contracts with the Secretary. Article 17 of the 1932 Contract provides that Interior must deliver water, as ordered by IID, up to the priority cap (emphases added):

> The United States **shall** . . . deliver to the District each year . . . so much water as may be necessary to supply the District a total quantity . . . in the amounts and with priorities in accordance with [those stated in the Seven-Party Agreement].
>
> * * *
>
> As far as reasonable diligence will permit said water **shall be delivered as ordered by the District**, and as reasonably required for potable and irrigation purposes within the boundaries of the District . . . . **This contract is for permanent water services** . . . .

In 1934, IID and CVWD executed a Compromise Agreement enabling CVWD to contract directly with the Secretary, but

expressly making CVWD's new rights to Colorado River water subordinate to IID's senior rights (the "1934 Compromise Agreement"). CVWD's subordination to IID was included in CVWD's 1934 permanent contract with the Secretary. Thereafter, within the third, sixth and seventh priorities, IID's right to Colorado River water has priority over CVWD's right.

The first priority holder to Colorado River water is PVID. The second priority holder is the Yuma Project ("YPID"). The third priority is held by three agencies. Priority 3a is held jointly by IID and the CVWD. Priority 3b is held by PVID for an additional and specific 16,000 acres. Priorities 3a and 3b are equal in priority. However, within Priority 3a, IID has rights senior in priority to CVWD.

The volume of Colorado River water available for consumptive use in a normal year to the first three priorities in the aggregate is 3.85 MAFY. Priority 3 has a volume available to it determined by subtracting the volume used by priorities 1 and 2 from 3.85 MAFY. Priority 3 is then split pro rata between priority 3a and priority 3b. CVWD, as the junior 3a right holder, is entitled to the volume in priority 3a not used by IID.

The fourth priority in California is held by MWD. In a normal year, MWD is entitled to use 550,000 KAF per year (less some more senior rights discussed below), plus any water not used by the first three priorities.

The first three priorities are often described as the California agricultural right holders. The agricultural agencies are in a higher priority position for a total of up to 3.85 MAFY, than the urban agency, MWD, which comes next for 550 KAFY. In

contrast, during a surplus condition, MWD, with priority 5, comes ahead of the agricultural right holders with priority 6 and 7.

Interior delivers water to California right holders pursuant to this permanent contractual priority schedule. Absent a shortage or surplus condition on the Colorado River, i.e., in a "normal" condition, California right holders are entitled to divert in the aggregate 4.4 MAFY. More is available in "surplus" years and less in "shortage" years. Calendar year 2003 is a "normal" year per Secretarial determination.

The result of this priority schedule, as set forth in the aforementioned agreements and under the law, is as follows:

NORMAL YEAR

Priority	Description	Annual Acre-feet
1	Palo Verde Irrigation District—for a gross area of 104,500 acres	)
2	Yuma Project (Reservation District) – up to a gross area of 25,000 acres	) 3,850,000
3a	Imperial Irrigation District (senior) Coachella Valley Water District (junior)	)
3b	Palo Verde Irrigation District—for 16,000 acres of mesa lands	)
4	Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain	550,000
	SUBTOTAL	4.4 MAFY

SURPLUS YEAR

Priority	Description	Annual Acre-feet
5	Metropolitan Water District	662,000
6a	Imperial Irrigation District (senior) Coachella Valley Water District (junior)	) 300,000
6b	Palo Verde Irrigation District—for 16,000 acres of mesa lands	)
7	Agricultural use	all remaining water
	SUBTOTAL	962,000
	GRAND TOTAL	5,362,000

For decades, California, specifically MWD and CVWD, used more than 4.4 MAFY because Arizona and Nevada were not diverting their full apportionments of Colorado River water and/or because the Secretary determined that the Colorado River was in a surplus condition. But, in 1964, a U.S. Supreme Court Decree warned all Colorado River water users that, when Arizona and Nevada used

their full entitlements during normal years, the 4.4 MAFY limit would be enforced against California. Arizona v. California, 376 U.S. 340, 342-43 (1964).

In recent years, because MWD and CVWD were facing looming cutbacks to their surplus (as has happened in 2003), Interior, as well as MWD and CVWD, began to question whether the irrigation practices of IID's customers were consistent with the beneficial use limitation in IID's contract and the law. However, through 2002, IID's water orders continued to be honored each and every year by Interior.

Additionally, the State of California was satisfied with IID's water use. Through a conservation program entered into with MWD in 1988, more than 100,000 AF per year of verified conserved water is transferred yearly to MWD. IID has been found by the State Water Resources Control Board ("SWRCB") to be in compliance with earlier SWRCB orders and California's reasonable beneficial use mandates.

Because MWD and CVWD had inadequate reliable water rights, IID has been negotiating to create newly conserved water to transfer to such junior rightholders in exchange for payment and other provisions. Interior offered to assist California with a gradual 15-year cutback to 4.4 MAFY if these transfers were consummated. The Quantification Settlement Agreement ("QSA"), if signed per the Secretary's wishes, would result in the gradual cutback. Interior, through Regional Director Robert Johnson and others, actively participated in the QSA negotiation process and proposed many of the provisions.

A major component of the QSA is a proposed 200 KAFY conserved water transfer from IID to the San Diego County Water Authority ("SDCWA"), the MWD member agency that uses the largest volume of MWD's Colorado River water. IID is willing to implement expensive conservation measures (paid for by SDCWA) in order to create conserved water and transfer it to SDCWA, but environmental concerns about the Salton Sea and other resource areas have raised significant roadblocks.

Others outside the Imperial Valley proposed that IID substitute long-term fallowing (non-farming) of farmland in IID as the source of "conserved" water under the QSA to reduce environmental impacts to the Salton Sea. Large-scale or long-term fallowing could cripple Imperial Valley's largely one-industry economy. Further, the cost and responsibility for paying for environmental mitigation, including sending water to the Salton Sea to protect endangered species, had not been agreed upon.

Interior sought to push IID into the QSA by rejecting IID's estimated water "order" for 2003 and promising IID's water to junior right holders ***unless*** IID signed the QSA by December 31, 2002, in which case IID's water order would be honored as requested. IID approved a revised QSA on December 31, 2002, and signed an agreement with SDCWA. However, Interior rejected the form of the QSA approved by IID.

On December 27, 2002, Interior notified IID that Interior would not deliver IID's 2003 water estimate of 3.1 MAFY. Interior informed CVWD that it would receive its full requested 347 KAFY, even though CVWD's rights are junior in priority to

IID. Interior informed MWD that it would receive 713 KAFY of water (assuming no execution of the QSA), rather than the 550 KAFY that is allocated to MWD at priority 4.

IID filed suit against Interior, asserting that Interior's actions in cutting IID's water order were illegal. The Federal Court agreed, and Interior's cutback was vacated by the Court. This *de novo* new Part 417 process ensued, pursuant to Court order. The Court ordered Interior to engage in a completely *de novo* Part 417 process, with all prior Interior findings and conclusions thrown out.

2. IID's Historic Water Use

IID's water use has varied significantly throughout the 20th Century. IID's use is driven by many variables: crop markets, climate, water salinity, improved irrigation methods, etc. Such variation is completely understandable, and is described in detail in Dr. Rodney Smith's report in Item 11-71, IID Exhibit 4, and also in the various Silva and farmer Declarations submitted in the lawsuit and which are part of the record here.

IID's diversions (less return flows) reached a ten-year low of 2.62 million AF in 1992 (inclusive of diversions by MWD under the 1988 IID/MWD Agreement), when whitefly infestation devastated major crops in the Imperial Valley. IID's diversions (less return flows) reached new highs of 3.22 million AF in 1996 and 3.27 million AF in 1997 (inclusive of diversions by MWD under the 1988 IID/MWD Agreement), due to strong economic conditions in crop markets, below normal rainfall, and changes in salinity of Colorado River water.

Different crops require different volumes of water, and the Imperial Valley crop mix dramatically changes over time in response to market conditions, causing changes in water needs. For example, in the 1930's English peas were a significant crop in the Valley, with 12,000 acres under production. Today, virtually no English peas are grown. Similarly, in the early 1960's about 60,000 acres of cotton were grown, yet today only about 13,000 acres are producing cotton. Other crops have shown dramatic increases in recent years. In 1966 there were only about 515 acres planted with Sudan grass, yet today there are about 50,000 acres producing Sudan grass. The changes in crops grown will continue into the future in response to changes and evolution in crop markets, seed types, salinity tolerances, and the development of domestic and international competition.

At various times IID has been criticized on the basis that despite more modern technologies, its water use increased during certain time periods. Such criticisms are unfounded. First, IID does not have a static water right, so to the extent it can beneficially use water, it has an absolute right to increase its use (up to the maximum agricultural cap of 3.85 MAFY, less Priorities 1 and 2). Second, IID farmers' changes in crops and increased crop yields have required more water. As shown in the accompanying report by NRCE (Item 1-1), Interior's assumption that evapotranspiration rates were the same in the 1920's as today is completely in error. Increased yields and different crop varieties have required increased water use. NRCE's larger overall report (Item 10-1) should also be consulted.

3. IID's Water Use And Tailwater Are Reasonable

Farmers in IID's service areas have been utilizing gravity flow of water across fields for a century, with approval from Interior. Such irrigation on IID's predominantly impermeable soils has always required a significant volume of tailwater. Unlike CVWD's service area, where the sandy soil soaks up the water and the runoff to the Salton Sea is underground, the farmers in IID's service area must work with soil that does not allow the water to seep in quickly. Tailwater is the natural result.

Interior has not limited IID's tailwater use for over seven decades. Even in the disputed December 27, 2002, cutback letter, Interior chose to construct a fallacious legal argument about the 1979 Consent Decree as a basis to cut IID's water back, rather than rely on tailwater analysis. However, in the "expert" reports created to defend its cutback decision, Interior criticized IID's tailwater.

At the time of the execution of IID's contract with Interior, and during the promulgation of the Boulder Canyon Project Act, all parties, including Congress, Interior, IID, MWD, and CVWD, were well aware of IID's customary irrigation practices, including gravity flow irrigation and the tailwater associated therewith.

The only "new" circumstance in 2003 that Interior asserts as a rationale for suddenly cutting IID's water supply on the basis of tailwater is that California is finally limited to its "normal" year supply of 4.4 MAF from the Colorado River. However, a normal year simply ends the availability of surplus

water. A normal year does not create a shortage. The fact that junior appropriators MWD and CVWD have lost access to surplus supply does not mean that IID must create a surplus supply for them. In Allen v. California Water and Telephone Co. (1946) 29 Cal.2d 466, 483-84, the Court held that a senior rightholder did not need to engage in costly methods so as to generate a surplus for a junior rightholder: "[T]hey are not required to centralize, localize, or scatter their pumping, or to unduly deepen their wells, or to undertake any other operations entailing a substantial increase of cost merely to enhance the surplus for the exporter."

Additionally, western water law is clear that junior appropriators acquire rights with notice of the means and methods used by senior appropriators, and they cannot complain about such later:

> It is well established that subsequent appropriators take with notice of the conditions existing at the time of their appropriations. In making their appropriations of storage or other water and their expenditures in connection therewith, defendants and their predecessors were chargeable with knowledge of the existing conditions, with reference not only to the amount of prior appropriations, but also to the existing diversion systems of prior appropriators. They cannot now argue that they are limited by the amount but not the means of prior appropriations, however reasonably efficient under the circumstances.

Crowley v. District Court, 108 Mont. 89, 88 P.2d 23, 27 (1939). (Emphasis added.)

In this case, MWD and CVWD knew full well when they acquired their new Colorado River rights in the 1930's that IID's farmers needed tailwater to irrigate successfully, and had been

irrigating with this method for decades. Interior, which also has always had full knowledge of IID's gravity flow irrigation and tailwater, has no right to now complain of such irrigation methods, simply because MWD and CVWD will "only" receive their normal year entitlements. In fact, MWD is receiving its full normal year entitlement, and the fact that it oversized its diversion aquaduct in reliance on the hope of continued surplus conditions should not influence Interior's evaluation of IID's irrigation practices.

IID's average conveyance and distribution efficiency from 1988 to 1997 was determined by Interior to be approximately 89%. In other words, about 11% of the water diverted by IID from the All-American Canal is lost to evaporation, seepage, and spills, rather than being delivered to farm headgates. The 89% conveyance efficiency is high, especially given the mammoth size of IID's irrigation delivery system and the complexities of its water distribution system. Table 1 shows the irrigation distribution efficiencies for various irrigation districts in the Lower Colorado River Region as reported by Interior in 1990:

Table 1. Irrigation Distribution System Efficiency of Various Projects According to the USBR (1990).

Irrigation Project	Irrigated Area (acres)	Net Supply (ac-ft)	Irrigation Water Delivery (ac-ft)	Distribution System Efficiency (%)
Wellton-Mohawk IDD	60,324	442,140	397,836	90
Imperial Irrigation District	463,030	2,974,647	2,654,689	89
Coachella Valley WD *	61,052	299,237	260,060	87
Yuma Valley Division	45,761	360,020	263,048	73
Salt River Valley	54,174	840,921	333,859	40

* The distribution system in the Coachella Valley is primarily buried pipeline.

In regards to on-farm efficiency, the California Department of Water Resources (DWR) assumes that California's statewide irrigation efficiency will improve to 73% by the year 2020. See

California's 1998 Water Plan Update Bulletin attached as Exhibit "B" to the Mesghinna Reply Decl. in the lawsuit, at p. 6-12 ("By 2020, the Department assumes that on-farm SAE [seasonal application efficiency] will average 73 percent statewide"). The 83% irrigation efficiency of IID has thus already surpassed the State's expected efficiency average, twenty years ahead of time. Per Dr. Mesghinna and NRCE (and other even earlier reports in IID's submittal), to attain such irrigation efficiency, IID growers often apply somewhat lower amounts of water than they really need, thus limiting tailwater, but also accepting comparatively lower crop yields.

Tailwater, which some assail as per se waste, is actually a vital and necessary component of Imperial Valley irrigation. Tailwater can be recaptured and reused in certain circumstances, but this requires the installation of expensive pumpback systems.

As explained in more detail by NRCE (Item 10-1), due to the low permeability of the heavy cracking soils in IID, it is difficult to adequately leach salts from the soil during regular irrigation applications. The nature of most of IID's soils requires more leaching water than can be calculated using traditional leaching formulae, which are more applicable to non-cracking soils. Though both horizontal and vertical leaching occur during regular irrigation, only a portion of the salts in the soil are leached at that time, while the remaining salt remains in the root zone, requiring additional leaching between crops. Further, the soil must have sufficient opportunity time to soak in enough water, yet water cannot be left on the field for too long. For a fuller description of the everyday problems

faced by IID's farmers related to such matters, see the Declarations at Items 1-15, 1-16, 1-17, 1-20, 1-21, 1-22, 1-24, 1-25, and 1-26.

When water is applied to heavy- and medium-textured clay-based soils, water tends to run off, with lesser amounts infiltrating the soil as compared to a light-textured sandy soil. Light-textured sandy soils usually have minimal surface runoff, but excess water infiltrates the soil and is then lost. IID's soils are predominantly heavy and medium textured soils with visually noticeable runoff (tailwater). In contrast, in CVWD, and most other irrigation districts in the lower Colorado River basin, excess water is lost underground in less visible ways. However, the water lost is no less drainage water, whether on the surface or subsurface.

When irrigation water is applied at the head of a field in IID, it picks up salts from the soil as it moves to the lower end of the field. NRCE determined that the salinity of the tailwater is about 30% higher than the water delivered at the head of the field. This significant horizontal leaching occurs because of the nature of IID's soils.

During regular irrigation on IID's medium and heavy soils, based on field tests, only 4.5% of the applied water drains vertically (as a result of low permeability), removing about 30% of the salt introduced by the irrigation water. About 17% of the applied water ends up as tailwater, removing approximately 22% of the salt introduced by the irrigation water.

NRCE determined that on many IID farms with medium and heavy cracking soils, it would be wise for growers to apply even more

water during irrigation for leaching and crop consumptive use purposes than they currently do, in order to increase crop yields. However, since higher water application can result in higher tailwater, growers tend to apply less than optimal water for crop use and for partial leaching of salts. As a result of insufficient leaching, the lower end of the field becomes too saline for high crop yields, thus decreasing the productivity of valuable acreage.

The alternative to tailwater is shutting off the irrigation prematurely, but in that case the bottom of the field will not be sufficiently irrigated, soil salinity will increase, and yields will decrease substantially. Mesghinna Reply Decl. Additional water is then used to leach between crops or salinity will go up. Farmers could leave the water on the surface for the extensive periods needed for vertical leaching to occur on impermeable soils, but many varieties of plants would die through flooding, scalding, "root rot," and similar problems.

4. State Law And The Part 417 Factors Show That IID's Beneficial Use Is Reasonable

All water rights in California are subject to a constitutional (Article X, section 2) and statutory (Water Code § 100) requirement of reasonable beneficial use. California law is clear that the reasonable beneficial use requirement is a question of fact to be determined after taking into account all facts and circumstances. Analyses of beneficial use typically look to the type of the use or the purpose of the use. A determination of what is a reasonable beneficial use involves consideration of the hydrological, economic, social,

environmental, and energy circumstances of the subject use of the water, and its relationship to other existing or potential beneficial consumptive or nonconsumptive uses. Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist. (1935) 3 Cal.2d 489, 547 ("[A]n appropriator cannot be compelled to divert according to the most scientific method known. He is entitled to make a reasonable use of the water according to the general custom of the locality").

Conformity with local custom of use, method of use, or method of diversion is not solely determinative of reasonableness, but it is an important factor to be considered and weighed in the determination of reasonableness. Water Code § 100.5[2] states:

> It is hereby declared to be the established policy of this state, that conformity of a use, method of use, or method of diversion of water with local custom shall not be solely determinative of its reasonableness, but shall be considered as one factor to be weighed in the determination of the reasonableness of use . . . .

If IID could easily save 350,000 AFY, as some claim, then IID's on-farm efficiency would be 92.6% (Mesghinna Reply Decl. in

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[2] In addition to § 100.5, it was well settled under California case law that local custom is an important factor in the determination of reasonable use. See "Prevention of Waste or Unreasonable Use of Water: The California Experience," John Kramer and Kenneth Turner, Agric. L.J. 1979-1980 at 529-530 ("The courts have frequently referred to local custom, such as common irrigation practices, in determining whether a particular practice is reasonable, or whether it constitutes a misuse of water."); Tulare Irr. District v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489 at 547; Joerger v. Pacific Gas & Electric Co. (1929) 207 Cal. 8 at 23; Witherill v. Brehm (1929) 207 Cal. 574 at 580; Allen v. California Water & Telephone Co. (1946) 29 Cal.2d. 466 at 483-484; and Erickson v. Queen Valley Ranch Co. (1971) 22 Cal.App.3d 578 at 584-585.

lawsuit), a figure that is not only unreasonable, but is unheard of for any major irrigation project. Id.

In 1998 the State of California estimated the cost to implement tailwater conservation to be approximately $150 per AF in the Lower Colorado River region. See Exhibit "B" to the Mesghinna Reply Decl., p. 6-13. That is almost 10 times the rate IID farmers currently pay for water, and would not be customary for the area.

Courts often refer to local custom as a factor in determining whether a particular practice is reasonable. Tulare at 547. Further, in reviewing the reasonableness of local customs, the SWRCB has taken into consideration the extent to which local users have adopted and are complying with widely accepted standards for efficient water management practices in the region and throughout California. SWRCB Decision 1638, September 18, 1997. Federal law is not in contravention of these principles (*infra*).

Using factors such as those stated above, NRCE's conclusion is that IID is reasonably and beneficially using its water. (Item 10-1.) Other studies, such as that by Dr. Charles Burt, came to the same conclusion. (Item 13-31.)

In addition to the many evidence submittals made by IID in the lawsuit, and which are now part of this proceeding, NRCE has provided additional opinions regarding efficiency and related issues. (Items 1-1 through 1-7.)

a. Comparison Of IID With Other Water Users

One of the critical factors Interior has repeatedly chosen to ignore in evaluating IID's water use is that IID's efficiency

is very high in comparison to other irrigators in similar climates. In fact, its efficiency is significantly higher than CVWD's, whom Interior seeks to provide with additional water.

IID has submitted a new comparison study by NRCE (Item 1-4) which shows that even using Interior and CVWD's own figures, IID is much more efficient than CVWD.

Interior initially approved CVWD's water order for 2003 (with input from no one but Interior and CVWD). Thus, Interior determined that CVWD's irrigation, which is less efficient than that of IID's, is nonetheless reasonable. There is no principled basis on which to cut back IID, whose farmers are more efficient than CVWD's and have a senior right to deliver water to a less efficient junior rightholder.

In addition to efficiency comparisons, Interior might also look to what the water is being used for in IID and CVWD. Many of Interior's suggested water redistribution methods single out alfalfa for reduction in IID (less cuttings, not watering in summer, etc.). However, alfalfa is a very important crop, both in IID and elsewhere. In addition to the many expert materials submitted, IID has submitted materials specifically on alfalfa, such as Item 20-137.

Interior's criticisms of alfalfa and other feed crops show a strange bias that is not founded in the law. As noted in the report by Dr. Michael Hanemann discussed below, large amounts of water in MWD and CVWD service areas are used for outdoor landscaping, golf courses, and other pleasantries that are pretty, or provide entertainment, but are certainly not critical. Interior has not proposed that water deliveries be reduced for

those uses. Thus, it appears Interior is making decisions based on political expediency, not the law or science. Interior has no right to reduce IID's water supply because it grows feed crops, as opposed to growing lawns of fairways in arid California that someone at Interior subjectively thinks are "better."

b. Possible Reduction Of Tailwater

There is no dispute that:

(1) tailwater has been, for the entire 20th Century, a usual and customary byproduct of irrigation in IID's service area; and

(2) tailwater conceivably could be reduced on some farms, for some crops, without adversely affecting yields (though there are significant arguments as to cost, efficacy of method, impacts on yields, etc.)

As NRCE's extensive water study report shows (Item 10-1), there are significant horizontal leaching benefits associated with tailwater in the IID service area. Further, as stated by IID, Mr. Silva, and all the farmer Declarations, it is critical that the "tail" end of the field receive sufficient water for crop growth and leaching of salts, and tailwater plays a vital role in ensuring that the lower ends of the fields are adequately irrigated.

Can some tailwater be reduced? Yes. But, the relevant questions are what methods will work, what do they cost, will such methods reduce overall water use, and what are the yield and soil impacts of the reduction? Without new (and expensive)

methods, IID's current level of tailwater is needed to properly irrigate the soils.

As described in Mr. Silva's Declarations, NRCE's reports, the MWD/IID Program data, and other submittals such as Dr. Smith's various reports in the SWRCB proceeding, IID has had sufficient experience with tailwater pumpback systems to believe that such systems can be effective for certain farmers, on certain soils, growing certain crops. They are not perfect, and not for use by every farmer. The water they pump back is saltier than the water applied at the headgate and contains pesticides, and certain crops cannot tolerate the salinity or pesticide differential. Further, they have maintenance and vandalism problems more completely described in some of the farmer Declarations. However, notwithstanding their drawbacks, they do show potential for some meaningful tailwater reduction that would allow reduced water use.

Their cost, however, is high, about $200 per AF for water conserved, as can be seen from NRCE's Report (Item 1-2), Dr. Smith's reports to the SWRCB, and the MWD Program costs. Just adding such costs to IID's current water rate of $16 per AF would multiply the costs of irrigation water to over 13 times what is currently paid.

Interior apparently believes that IID can eliminate tailwater at minimal cost. However, the methods suggested by Interior are in fact expensive or just do not work. Before Interior can reduce IID's water order due to excess tailwater, Interior must support such a determination with a detailed

factual analysis of all applicable costs and proof that such method should work on large fields.

NRCE has performed an analysis of the methods suggested by Interior and MWD experts in the lawsuit submittals (Item 1-2). In that review, NRCE concluded that the costs for the methods suggested are in fact many times what was theorized. Further, as noted by NRCE, such costs (and those previously offered by Interior) do not include the substantial costs of environmental mitigation, IID program administration, or incentive and risk payments to the farmers. In other words, one cannot just say, "It costs $100 to build this facility on the farm." One has to add in all the costs associated with the measure that IID supposedly should have implemented.

The analysis performed by Greystone Environmental Consultants, Inc. (Item 1-8), shows that just the environmental mitigation costs in 2003 for a 300,000 AF tailwater reduction would be $112.17 per AF. If one adds that to a $100 per AF construction/operation cost, one is already at $212.17, and that is without any farmer incentive or risk payments, IID administrative costs, or factoring in the costs of lost power generation or lost water sales. At $16 per AF as of the start of 2003, IID's farmers are already paying the highest per-acre foot charge of any irrigators receiving Colorado River in the Lower Basin. (Item 1-3.) An increase to $212.17 AF would be over 13 times what IID's farmers are paying now. Their crops would no longer be competitive, as shown in the Dornbush Report previously submitted.

In addition to these expert opinions, the Declarations from farmers within IID are important. These individuals have first-hand experience with some of the methods suggested. What is noteworthy about their experience is that some Interior-proposed methods do not work, most are very expensive, and when the methods do reduce or eliminate tailwater, they create increased water use, not reduced deliveries.

The law does not require a senior appropriator to incur large expenditures so a junior can receive more water. In Joerger v. Pacific Gas & Electric Co. (1929) 207 Cal. 8, 23, the Court, citing the California Supreme Court decision Barrows v. Fox (1893) 98 Cal. 63, applied the customary standard, stating:

> [A]n appropriator . . . is not bound . . . to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality and as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system. [citation].

Joerger at 23.

Similarly, in Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 3 Cal.2d 489, the Court stated that an appropriator cannot be compelled to divert according to "the most scientific method known," but is entitled to make a reasonable use of the water according to "the general custom of the locality," so long as the custom does not involve unnecessary waste. 3 Cal.2d at 547. The Tulare court also noted

that large expense should not be imposed to change what had been a longstanding methodology:

> There can be no doubt that respondents as a group do not divert the water in the most scientific manner. There can be no doubt that in some cases, because of the paralleling of the ditches of some of the respondents, there is an uneconomic use of water. . . . The courts cannot and, even if they had the power, should not compel these appropriators, many of whom, have been diverting water for over fifty years, at their expense, to build new systems of diversion.

Id. at 572.

Further, unlike the yield reduction methods espoused by Interior, yield loss is not a standard that an appropriator must accept. In U.S. v. Alpine Land and Reservoir Co., 697 F.2d 851 (9th Cir.1983), the Ninth Circuit rejected Interior's argument under the reasonable and beneficial use limitation that a Nevada water district buying water from a federal reclamation project used too much water. The Court held that the amount of water the district was awarded by the district court had been "customarily" provided to its farmers for more than 60 years. Id. at 856-57. It also ruled that the district's evidence of "historical" water usage showed that the amount was reasonable. Id. at 857. While Interior presented evidence that historical yields could be obtained with less water, the district's evidence showed that that amount "would drastically reduce the farmers' yields over the long run." Id.

Similarly, in U.S. v. Gila Valley Irrigation District, 31 F.3d 1428 (9th Cir. 1994), the United States argued, on behalf of an Apache tribe, that it was not prohibited from diverting

water in an Arizona project by means of unlined ditches used for gravity-flow irrigation. The Ninth Circuit agreed, holding:

> [T]he Apache Tribe is correct in its assertion that . . . the district court's opinion which holds that the Apache Tribe does not have to line their canals is in accord with the general principles of prior appropriation law. The law of appropriation does not dictate that the senior user must use the most efficient diversion system. . . . Here, unlined ditches are the usual and ordinary means of diverting water. Therefore, the Apache Tribe can no more be compelled to line their canals . . . than they could be required to substitute iron pipes."

Id. at 1433-34.

IID's irrigators have long used gravity flow irrigation required by IID's delivery system, the climate, the soils, and the crops in IID. For Interior to force them to institute unproven and expensive alternative methodologies now is against all legal precedent, and is a denial of their water rights.

c. Interior's Theories Are Unproven

In the lawsuit, Interior offered numerous "expert" opinions as to how IID could cheaply conserve huge volumes of tailwater. IID and its experts disagree with many of the conclusions reached by Interior's experts. Additionally, Interior's opinions suffer from a major problem: they are based on blackboard theories, not meaningful field testing.

As stated in detail in NRCE's multi-volume report (Item 10-1), the types of soils within IID differ significantly, and the irrigation methods used on such soils correspondingly must vary. There are many other variables, such as crop type, land contour, timed water delivery availability, etc. Despite such

substantial variation, Interior relies almost exclusively on a tiny experimental study performed by Dr. Bali involving access to unlimited water at the flick of a switch, unusual groundwater, and other benefits not available to most farmers in IID. Even with such benefits, Dr. Bali's low tailwater use resulted in serious yield losses that increased over time as soil salinity escalated. Included in IID's submittal at Item 1-5 is a critique of Dr. Bali's work by both NRCE and IID staff. Also, Mr. Leimgruber's Declaration (Item 1-25) casts serious question on the validity of Dr. Bali's work product.

For Interior to impose any water reduction in reliance on theories not subject to thorough field testing is completely improper. Without actual testing, Interior would be simply adopting academic theories without actually verifying that they work in IID's service area on a large scale. The citizens of the Imperial Valley would act as guinea pigs and suffer the consequences of failure.

Interior has admitted that to do a proper study of IID so as to make a rational reasonable beneficial use determination requires lengthy, large-scale field testing. Item 21-18 is a 1997 memo from the Bureau of Reclamation to IID. In it, Mark Niblack of the Bureau specifies what would be required to "produce a data base of farming and irrigation practices in the Imperial Valley which can be used as a factual basis for establishing a reasonable beneficial use of water." He then outlines a $560,000 study, and concludes, "The total time to do the job properly would be at least three years." Interior has

embarked on no such studies, but instead has chosen to propound theoretical ideas as irrigation gospel.

This problem cannot be underestimated. For Interior to cut IID's water based on the theories of persons who have never performed any large-scale field tests in IID is a direct flouting of the scientific method. Courts would not impose such cutbacks on the basis of untested ideas. The Courts give short shrift to expert theories that have not been properly field tested. The Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588-595 (1993) underlines the fundamental precept that an adjudicator, which is the role Interior is trying to play here, must act as a "gatekeeper" in only allowing scientific opinion testimony that is reliable, relevant and trustworthy to ensure the administration of equitable justice.

Applications of Daubert are instructive. The court in Coffey v. Dowley Mfg., Inc., excluded expert testimony based on assumptions and "guestimations" for important mathematical data input into a larger model. Coffey v. Dowley Mfg., Inc., 187 F. Supp. 2d 958, 974 (M.D. Tenn. 2002). In analyzing the accuracy of a computer model purportedly showing the defective properties of an automotive tool, the court determined that the plaintiff's expert had made incorrect assumptions for the values of the size of a tool and applied torque. Id. Extrapolating such parameters into a larger model results in incorrect and unreliable evidence. As the Coffey court noted: "'garbage in, garbage out.'" Id.

Likewise, in Lord v. Fairway Electric Corporation, the plaintiff attempted to offer expert testimony that a copper

sliver ignited into an electrical arc that seriously burned the plaintiff. Lord v. Fairway Elec. Corp., 223 F. Supp. 2d 1270, 1281 (M.D. Fla. 2002) The defendants asserted that the expert had made improper extrapolations from the data. Id. The data in question was a gouged piece of metal, and the extrapolation was that a straight copper sliver resulted from the gouge and closed an electrical circuit, which in turn caused the arc and injured the plaintiff. The Court noted that this extrapolation amounted to "stacked and tenuous inferences" that "do not weigh in favor of reliability." Id.

The scientific method mandates "reliable principles and methods," and a key to that is whether the proffered theory or principle "can be *(and has been)* tested."[3] Daubert, 509 U.S. at 593 (emphasis added). While Daubert recognized that not all scientific evidence offered by experts is capable of being tested, the Supreme Court did recognize that whether a technique or theory can be tested is a "key question" to be answered. Daubert, 509 U.S. at 593.

Case law emphasizes that where testing is possible, it should be performed, and furthermore, where such an option is available and not undertaken, such evidence is not allowed. See Coffey v. Dowley Mfg., Inc, 187 F. Supp. 2d 958, 965 (denying admission of plaintiff's evidence in part because tests were not

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[3] Daubert provided a nonexclusive list of factors to be considered in assessing scientific evidence to determine whether the opinion is "grounded in the methods and procedures of science." Daubert, 509 U.S. at 590. These include the testability of the theory, publication and peer review, assessment of the known or potential error rate, and general acceptance of the theory in the relevant scientific community. Daubert, 509 U.S. at 593, 594.

performed on a tool available on the open market and noting expert's conclusion that "actual testing is preferable when the actual product is available"); Lord v. Fairway Elec. Corp., 223 F. Supp. 2d 1270, 1283 (excluding expert testimony as unreliable in part where expert did not perform test to determine size of copper sliver and opposing side did). C.f. Brooks v. Outboard Marine Corp., 234 F. 3d 89, 92 (2nd Cir. 2000) ("The failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony" (citations omitted)); Brown v. Parker Hannifin Corp., 919 F. 2d 308, 312 (5th Cir. 1990) (excluding expert's testimony in part because he did not test his theory).

This Part 417 proceeding is not a civil case (although under the 1932 Contract it is required to be), but the above principles are applicable. The scientific method requires not just theories and hypotheses, but actual full-scale testing to see whether such theories actually work. (See NRCE's report at Item 1-6.) Since this is an adjudicatory proceeding, and since Interior should honor the scientific method in any event, no significant water cutback can be ordered without full-scale testing of Interior's proposed methods in the unique setting of the Imperial Valley. There is an old expression, "easier said than done." Such is true of Interior's irrigation theories.

Interior itself, when its decisions are driven by candor and not politics, has admitted that there can be major disparities between small experimental work such as Dr. Bali's, and actual large-scale on-farm applications. In the U.S. Bureau of Reclamation report entitled Comparisons of Equations Used for

Estimating Agricultural Crop Evapotranspiration with Field Research, Hill et. al.,1983, the Bureau states (Item 1-6):

> It was recognized that differences in scale and cultural practices between research and farm fields could result in uncertainty as to how to relate crop water use determined under research conditions to ET expected in farm fields. Examination of the nature of these differences resulted in the assumption that ET and yield, as experienced under average high yield research situations, would be greater than for reasonably high attainable farm field conditions. Thus, research yields and corresponding ET were assumed to be 20 and 10 percent greater than field-attained yields and ET (ET_{fa}) for alfalfa and corn, respectively. It was further assumed that harvesting practices could result in additional reductions such that attainable farm yields would reasonably be 18 and 10 percent greater, respectively, than expected alfalfa and corn yields on the farm."

(Emphasis added.)

Thus, without extensive field testing on a large scale, Interior's experts are in fact just making educated guesses as to IID's water needs. IID's water right should not be cut back on such speculative bases.

d. IID's Farming Is Of Major Value To The State And The Region

Agriculture in IID is a $1 billion industry. Numerous field, vegetable, and permanent crops are grown each year on approximately 500,000 acres of irrigated farmland. The crops grown in the Imperial Valley are very diverse, from sugar beets to alfalfa, carrots to onions. Imperial Valley agriculture had a production gross value of $1.01 billion in 2001 (the most recent year with complete figures), with the following crop breakdown:

(a) vegetables and melons $403.4 million; (b) field crops $284.9 million; (c) livestock $243.2 million; (d) seed and nursery $38 million; (e) fruit and nut crops $37.2 million; and (f) apiary $3.7 million. The virtually year-round ample sunshine allows Imperial Valley farmers to grow crops throughout every season. Much of the land is double and triple-cropped.

If IID's farmers are provided less water deliveries because of an Interior cutback, they will have to reduce their overall production. No matter what method farmers choose to utilize in implementing such reductions, by necessity such reductions will result in fewer local jobs. Many of the people employed in agriculture in the Imperial Valley are seasonal laborers, not full-time salaried employees. These workers do not even have the marginal job security that a full-time worker possesses. It is simply not credible to believe that farmers will hire as many people as they always have if they are growing fewer crops and/or irrigating less acreage. Lost agricultural production will also affect purchases of materials for such agriculture, such as seed, fertilizer, insecticides, herbicides, machinery, etc.

In addition to the direct losses caused by reduced agriculture because of less water, IID water and power rates would have to increase if Interior cuts IID's water supply. These increases will also have an extremely detrimental effect on the Imperial Valley. IID's water and power customers include the majority of residents of Imperial County, one of California's poorest regions. Many of IID's residential customers are farmworker families, for whom rate increases will strain already limited budgets. Such rate increases would be coming at the same

time that jobs would be shrinking because of reduced agriculture, as stated above. Per 1999 census data:

- 22.6% of Imperial County's residents are below the poverty line;
- The average per capita money income in Imperial County is only $13,239; and
- 72.2% of Imperial County's residents are minorities of Hispanic or Latino origin.

Agriculture thus makes IID's water right of critical import not just to IID and its landowners, farmers, and citizenry, but also to California and the entire nation. Were Interior just to shut off IID's water supply late this year, there would be huge crop losses that would devastate the region, all as detailed in the Declarations IID earlier submitted. Interior has not done any study of the effects of a major water cutback on the economy of Imperial County, or on the ramifications for the State of California.

B. Part 417 Itself Is Invalid

As stated in IID's Complaint against the United States, IID contends that Part 417 is itself an invalid regulation. However, IID has no delusion that Interior will reject the validity of its own regulation. Thus, IID does not provide a detailed legal argument here as to why the regulation is invalid, saving that for later judicial proceedings. The general bases for IID's contentions as to Part 417, however, are as follows:

1. The water delivery contract between IID and the United States, in Article 27, states that all disputes about interpretation and application of the contract will be decided by a Court, or an arbitration panel (if the parties can agree to the latter). To the

extent there is disagreement over whether the volume of water estimated to be needed by IID for 2003 is reasonably required for beneficial use, this dispute must be adjudicated by a Court under the Contract. Interior cannot unilaterally, and decades after the fact, change this contractual provision. If Part 417 is a process by which Interior simply makes up its mind about what it thinks of a Contractor's use, it may be appropriate. However, Interior asserts that the Part 417 process is a type of adjudication of IID's contract right. Thus, Part 417 is inconsistent with and constitutes a breach of the Contract by Interior.

2. Part 417, as apparently interpreted by Interior, grants to Interior an improper adjudicatory role nowhere authorized in the Boulder Canyon Project Act or other Reclamation law. There is no statutory precedent or authority for Interior to act as a beneficial use adjudicator for Colorado River water right holders. Such role is a usurpation of the judicial function by the Executive Branch without Congressional authorization. It is not sufficient to point to the use of the word "reasonable" in the IID contract. Any authority for Interior to carry out adjudicatory functions affecting long-held property rights must come from Congress, and there is no legislative basis for Interior's claiming a right to adjudicate water right disputes on the Colorado River.

3. The exercise of an adjudicatory function, formal or informal, by an executive agency requires compliance with due process and other such protections. Part 417 does not provide any such protections, though it does not expressly prohibit them either. As applied by Interior (see below), however, Interior apparently interprets Part 417 as not requiring compliance with due process requirements.

C. This *De Novo* Part 417 Process Is Legally Defective

In addition to the inherent invalidity of Part 417, the implementation of Part 417 by Interior in this *de novo* proceeding, treats IID discriminatorily in contravention of law and the requirements of Part 417 itself.

1. This *De Novo* Part 417 Process Violates IID's Due Process Rights And Violates Part 417

Interior's *de novo* Part 417 review, as implemented, violates IID's due process rights as well as Part 417's own terms.

a. No Consultation Provided

Interior's *de novo* Part 417 procedures preclude any in-person meetings, hearings, or testimony. The Notice states: "The Part 417 consultation will be conducted by the Regional Director through the collection of written information." As a result, Part 417's required "consultation" will not occur. Part 417 consultation requires some form of in-person collaborative process. This interpretation is supported by the language and structure of Part 417 itself, other similar statutes and regulations, the plain meaning of the term "consultation," and Interior's own prior conduct. Thus, the current framework shows that Interior is not "meticulously" following Part 417, as ordered by the Court.

Absent a definition of "consultation" in the applicable statute, "consultation means what consultation ordinarily means." Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 117 (1st Cir. 2002). See also Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 833 (9th Cir. 1996) ("[w]here a statutory term is not defined in the statute, it is appropriate to accord the term its 'ordinary meaning'"). "Consultation" is defined as "a meeting to discuss something or to get advice." Cambridge Dictionary Online (2003). "Consult" is defined as "to discuss something with someone before you make a decision." Id. Thus,

these most basic definitions of the term demonstrate a meaning of "consultation" that requires an in-person collaboration.

Even apart from these basic definitions, the structure of Part 417 itself demonstrates that "consultation" requires more than the review by Interior of written submissions. In construing a law, a court must look not only to the disputed provision, but to the structure of the whole law, its object, and policy. See, e.g., F.D.I.C. v. McSweeney, 976 F.2d 532, 537 (9th Cir. 1992), cert. denied 508 U.S. 950 (1992).

Part 417.2 requires that Interior "arrange for and conduct such consultations" (emphasis added) that are necessary to determine the appropriate distribution of Colorado River water. In turn, Part 417.3 provides for procedures by which a contractor can challenge any determination made by Interior after its consultations pursuant to Part 417.2. After such consultations, then under Part 417.3 a contractor may submit "written comments or objections" to Interior's determination and "request further consultation" (emphasis added). At no point in Part 417.2 is the term "written" used. Thus Part 417.3 provides a clear distinction between "written comments and objections" and the "consultation" process. If the "written comments" constituted "consultation," as Interior now claims, then there would be no need under Part 417.3 for the Contractor to "request further consultation," as the two would be identical. A statute should not be read to as to be redundant, and should be read to give effect to all of its provisions. See, e.g., Zimmerman v. Oregon Department of Justice, 170 F.3d 1169, 1177 (9th Cir. 1999), cert. denied 531 U.S. 1189, quoting National Resource Defense Council,

supra., 82 F.3d at 834 ("'we have long followed the principle that statutes should not be construed to make surplusage of any provision.'"). This rule applies with equal force to agency regulations. See, e.g., Cammarano v. United States, 358 U.S. 498, 505 (1959) (rejecting construction of agency regulation that would make a portion "pure surplusage").

The distinction between "consultation" and written submissions is even more clearly highlighted in Part 417.4, governing contractors' requests for modification of the Bureau's findings or orders. Under Part 417.4, a contractor may "apply in writing" for modification of the Bureau's determinations as a result of changed conditions, emergency, or hardship (emphasis added). Upon receipt of the contractor's modification request, the Regional Director "shall arrange for consultation with the Contractor." Again, if the written application constituted "consultation," as Interior's *de novo* procedures establish, the following clause requiring "arrangement" for consultation would be meaningless and redundant. The regulations are extremely specific when the contractor is to submit written materials, and those written submissions are always distinct from the consultation requirement.

This interpretation also is supported by the use of the term "consultation" elsewhere in 43 C.F.R. For example, under 43 C.F.R. Parts 10.3 and 10.5, governing protection of sacred Native American graves, if a federal agency engages in a project that it believes may intentionally or inadvertently excavate human remains or sacred objects, it must provide a notice of the activity as well as "propose a time and place for meetings or

consultations" to consider the treatment of those remains (emphasis added). This regulation plainly recognizes "meetings" and "consultations" to have the same meaning. That meaning plainly requires an in-person process, or else there would be no need for a "time and place" for it. Thus, Interior has demonstrated in its regulations that a "consultation" and a "meeting" are synonymous. Interior's proposed Part 417 procedures solely based on written submissions are not a "meeting," and therefore cannot be "consultation" under the Department's own definition of that term.

Part 10.5 also makes the same distinction as Part 417 regarding consultation and written submissions. Under Part 10.5, "following consultation, the federal agency must prepare, approve, and sign a written plan of action" regarding remains or objects found. Again, if "consultation" implied or could be satisfied by solely written submissions, a specific requirement of a "written plan of action" would not be necessary and would be wasted words. Such a construction should be rejected. See Zimmerman, supra.

Other statutes and regulations outside of 43 C.F.R. also demonstrate that the term "consultation" requires in-person meetings. 25 U.S.C. § 2011, governing Indian education, requires "all actions under this Act shall be done with active consultation with tribes." The consultation required is defined as "a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau [of Indian Affairs] and all interested parties." 25 U.S.C. § 2011(b) (emphasis added).

Importantly, Interior's historical "consultations" under Part 417 have been in-person meetings allowing for questions and answers. For the past decade, Interior has met annually in person with Colorado River Contractors pursuant to Part 417. At no time has Interior ever suggested that any other procedure constituted "consultation." Interior's conduct for the past decade demonstrates its own interpretation that "consultation" requires in-person discussions.

Interior's *de novo* Part 417 procedures eliminate any in-person meetings or hearings, and thus violate the "consultation" requirement under Part 417. IID has submitted a large amount of material that should be addressed through in-person consultations. Meticulous compliance with Part 417 would involve more than Interior acting as a maildrop for all interested parties.

b. No Cross-Examination Allowed

Interior has refused to allow IID to cross-examine those who are presenting "evidence" to Interior that is adverse to IID. For example, Interior has listed numerous reports by Dr. Rhoades and Dr. Jensen in the "Administrative Record," yet these Interior-commissioned experts simply opine at will, with no chance for IID to explore the bases for these opinions or to show the fallacies of their conclusions under cross-examination. Similarly, IID expects MWD and CVWD to submit theorists' reports adverse to IID, yet IID will not be given a chance to cross-examine these witnesses, or even see these reports before IID must file its own evidence.

Such procedures are a clear violation of IID's due process rights. IID's water right is a property right protected by due process: "[A] valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment." Madera Irr. Dist. v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993); see also Maricopa-Stanfield Irrigation & Drainage Dist. v. U.S., 158 F.3d 428, 435 (9th Cir. 1998); and Nevada v. United States, 463 U.S. 110, 126 (1983).

Interior adjudications, even informal ones, must meet due process requirements. The Administrative Procedures Act ("APA"), under which auspices Interior contends that it is acting, authorizes a reviewing court to set aside the agency action if it is "without observance of procedure required by law," including applicable constitutional due process requirements. 5 U.S.C. § 706(2)(D). See, e.g., Greene v. Babbitt, 943 F.Supp. 1278, 1285 (W.D.Wash. 1996) ("[e]ven if there is 'substantial evidence' in the record for an agency finding, the court must set the finding aside if the agency failed to follow the 'procedures required by law' in making its determination.").

The test for whether a particular agency procedure violates due process was described by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976):

> "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." [Citation] . . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used,

> and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-335.

The Ninth Circuit applied this test in a line of cases including issues analogous to this matter: Greene v. Lujan, 1992 WL 533059 (W.D.Wash. 1992), aff'd Greene v. United States, 996 F.2d 973 (9th Cir. 1993) and Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995).[4] In Greene, Interior determined by "informal" adjudication that the Samish people were not a recognized tribe. The tribe challenged the decision, asserting that the process did not grant them a hearing or an opportunity to cross-examine witnesses and violated due process under the Mathews test. The lower court agreed and ordered the agency to perform a full hearing with appropriate APA formal adjudication safeguards (administrative law judge, cross-examination, etc.). Greene v. Lujan, 1992 WL 533059 at 9. The Ninth Circuit confirmed that the informal adjudication by Interior violated due process. The Ninth Circuit first summarized the procedural inadequacies outlined by the District Court: inability to call witnesses; no argument permitted before the decision was made; lack of access to all material evidence; and lack of impartiality. Greene, 64 F.3d at 1274.

[4] The unpublished lower court opinion is cited only for factual context and the court's order that was reviewed by the Ninth Circuit.

As the Ninth Circuit explained, "[d]ue process generally includes an opportunity for some type of hearing before the deprivation of a protected property interest" and "'in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'" Greene, 64 F.3d at 1274, citing Goldberg v. Kelly, 397 U.S. 254, 269 (1970). (Emphasis added.)

Interior provides due process in analogous settings; Interior has simply chosen not to allow due process in this *de novo* Part 417 proceeding. For example, in contrast to the final review authority granted to the Secretary under Part 417, other Interior regulations require more expansive adjudicatory proceedings, with final review authority resting with independently appointed administrative law judges. See 43 CFR Part 4. [All of the following references to the CFR are to Title 43.] For example, § 4.1(a) establishes a hearings division within Interior that is comprised of administrative law judges. Within the hearings division, Part 4 (Subpart C) establishes a Board of Contract Appeals with the authority to consider and decide appeals. § 4.1(b)(1). The Board of Contract Appeals operates under a comprehensive appeals system including the filing of pleadings (§ 4.107), prehearing and presubmission conferences (§ 4.111), discovery (§ 4.115), notice requirements (43 Code of Federal Regulations Part 4, Section 4.119), and procedures for the examination of witnesses (Section 4.123).

In addition to the Board of Contract Appeals, Part 4 establishes within Interior similar appeal and adjudicatory procedures for the Bureau of Indian Affairs (Subpart D,

commencing with § 4.200) and the Bureau of Land Management (Subpart E, commencing with § 4.400). Similar to the Board of Contract Appeals, these adjudicatory systems contain extensive appeals procedures including the taking of depositions, discovery and pre-hearing procedures (§§ 4.220-4.225, §§ 4.430-4.433), and the conduct of hearings and presentation of evidence and witnesses (§§ 4.230-4.236, §§ 4.434-4.439). The intent of the regulations contained in Part 4 is clear - to provide those affected by actions taken by Interior officials with an opportunity for a fair hearing. In contrast, the *de novo* Part 417 procedures lack such procedural safeguards.

The water right that Interior is attempting to adjudicate in this *de novo* process is the sole source of water for an entire community, and for a $1 billion agricultural economy. Such a vital resource to thousands of people should not be adjudicated without a full and fair chance to cross-examine adverse witnesses under oath.

c. No Discovery

If IID were allowed a cross-examination right, its value would be significantly diminished without discovery. Further, because Interior has not allowed IID a discovery right (though it was requested). IID will be unable to properly rebut the reports of adverse party experts and witnesses.

The federal courts have held that discovery must be granted in an administrative proceeding "'if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.'" Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985); see also Lopez v United States, 129 F.

Supp. 2d 1284, 1289 (discussing Sims v NTSB, 662 F.2d 668, 671-672. (10th Cir. 1981) "where a complete denial of discovery can be shown to have caused clear prejudice, a due process violation might result."); and NLRB v. Gala-Mo Arts, Inc., 232 F.2d 102, 106 (8th Cir. 1956).

Moreover, Ninth Circuit case law is consistent with the above analysis found in federal jurisdictions across the United States. See Electromec Design and Development Co. Inc. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969) (following NLRB v. Gala-Mo Arts, Inc.); and Mohilef v. Janovici (1996) 51 Cal.App.4th 267, 302 (recognizing due process mandates granting discovery if prejudice is shown).

Thus, IID is entitled to the right to discovery for this *de novo* Part 417 process to be fair, yet Interior has denied such right.

d. Insufficient Time

Interior's schedule for the initial, objecting, and appellate submittals are too short and deny IID due process.

The basic time framework for parties (other than Interior) stated in the Notice is as follows:

Step 1: Submittals within 30 days of the Notice;

Step 2: Comments and objections on Regional Director's recommendations and determinations within 30 of receipt; and

Step 3: Appeal Regional Director's determinations (after review of comments and objections) within 30 days of receipt.

If the foregoing deadlines were simply deadlines in which to file a one-page document, they would be more than sufficient. However, each of the three stages specified above requires an extensive amount of expert analysis, briefing, and coordination pertaining to hundreds of thousands of pages of documents. These are simply insufficient time periods for prosecuting or defending a beneficial use review of this magnitude, and are thus unfair and a violation of due process.

e. Not Prospective For Following Year

Part 417 is explicitly written as a prospective review for the ensuing year, not a retroactive review. For Interior to ultimately decide in October of 2003 that IID's water order for 2003 will be cut would leave the Imperial Valley an impossible task: to cut back hundreds of thousands of acre-feet in less than three months.

The *de novo* Part 417 process violates the prospective requirement of Part 417. For example, Part 417.2 states that the Regional Director "will, prior to the beginning of each calendar year, arrange for and conduct such consultations . . . ." (Emphasis added.) It is not discretionary, but mandatory, that the consultation take place in the preceding year. Later in that section the regulation states that the determinations are for the "ensuing calendar year." Additionally, Part 417.3 requires that notice of a water reduction must be given to the Contractor such that it "may reasonably be delivered at least 30 days prior to the first date water delivery would be affected thereby . . . ." IID's water delivery would be affected January 1, 2003, on any Part 417 determination for 2003, and thus there is simply no way

for Interior to comply with its regulation at this late date (an event Interior brought upon itself).[5]

Part 417 mandates a determination made during 2002 for 2003. Contractors cannot be required to suddenly shut off the sole water supply for an entire community on a moment's notice at the whim of Interior. Adequate notice that the next year will be reduced is what Part 417 requires. The current process has been designed by Interior so that even though Interior botched its earlier Part 417 review, IID and its customers might suffer a catastrophic water reduction during the peak growing season. Part 417 was written to require advance notice for the following year, and Interior's current process denies this reality.

Interior should move on to planning for next year rather than trying to reach a "retroactive" determination in a process that requires "prospective" notice. Anything short of that is a violation of Part 417, and of the protections in those regulations designed to give Contractors adequate notice of any water use reduction for the coming year.

f. Singling Out IID Without Concurrent Action For Other Contractors

The *de novo* Part 417 process can be summarized as follows: everyone everywhere can participate in Interior's review of IID's water use, but MWD, CVWD and other Contractors' Part 417

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[5] Under Interior's reading of the regulation, as evidenced by statements made in the lawsuit and by the manner in which this *de novo* Part 417 review has been crafted, Interior can simply wait until near the end of a calendar year, and then cut off a Contractor's water supply completely, claiming it gave "30 days notice." This is a far-fetched reading of the regulation, which clearly requires determinations prior to the ensuing calendar year.

proceedings are "closed books," having already been determined by Interior without input from anyone.

Is this fair? Hardly. Yet, it is indicative of how Interior has treated this entire *de novo* Part 417 process, choosing to target IID and to hold IID to standards and scrutiny not required of any other Contractors.

IID is not opposed to access by all Contractors to all Colorado River use reviews. IID believes that because of the priority system on the Colorado River among California Contractors, due process requires each of those Contractors to have an opportunity to participate in any reasonable use review of the others. As stated by CVWD and MWD in their pleadings filed in the lawsuit:

> The Secretary's decisions on IID's and CVWD's water order are interdependent given the fixed nature of the 4.4 MAF 'pie' available to California—and within that, the 3.85 MAF 'pie' available to agricultural agencies—and the 'zero sum' of any division. . . .

(CVWD Memorandum of Points and Authorities in Support of Intervention, p. 17 (emphasis added); also, MWD Memorandum of Points and Authorities in Support of Intervention, p. 17.)

Whenever any California Contractor gets more water, less water is available for all other junior right holders. Thus, Secretarial "adjudication" about PVID, Yuma, CVWD or MWD affects IID, and vice versa. Yet, under the *de novo* Part 417 process, participation and review of a determination are limited to separate adjudications, and only the Contractor involved can seek Secretarial or judicial review. As a result, "determinations" under Part 417 are violative of due process. This defect

pervades the Part 417 process, where Interior meets only with each Contractor separately; makes determinations with no input from others affected; keeps each "administrative record" separate and secret from all others affected; and limits review rights only to a Contractor whose order is reduced. In the context of a complex water rights determination, due process requires much more.

Further, IID's *de novo* Part 417 review is subject to "open review," while other Contractors are treated differently, even though determinations about the reasonable beneficial use needs for all California Contractors are deemed to be relevant to an examination of IID's reasonable beneficial use.

g. A Neutral Decision-Maker Is Required

Interior has chosen to utilize Regional Director Robert Johnson to make the initial recommendations and determinations under Part 417, with IID having the right to appeal to the Secretary of the Interior.[6] However, Mr. Johnson and his staff have prejudged this matter, and in fact secretly met in 2002 with MWD to develop a "gameplan" for use against IID, while pretending to "consult" with IID without disclosing any of the studies Interior had obtained. IID has therefore filed an Affidavit for recusal of Mr. Johnson.

Mr. Johnson formed his opinions long ago. For example, about five or six years ago, Mr. Silva attended a meeting with Mr. Johnson in Boulder City, Nevada, to discuss a potential IID water transfer. During the meeting, Mr. Johnson said that IID

[6] Assuming the Secretary does not decide to delegate her role as before to Mr. Raley.

farmers could very inexpensively save a lot of water. When asked what he meant by "inexpensively," Mr. Johnson replied that IID could save a lot of water for "a couple of bucks per acre-foot." That opinion is completely unfounded, is not a result of any consultation or specific findings under Part 417, and is inappropriate for a "neutral" adjudicator.

Mr. Johnson's bias was confirmed recently during IID's motion for preliminary injunction. In opposition to IID's motion, Mr. Johnson submitted a Declaration, in which he describes IID's irrigation practices as "wasteful," and claims that "IID is capable of managing its water more carefully when it has to." See Declaration of Robert W. Johnson in Support of Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, dated February 23, 2003, ¶¶ 24, 30, pp. 11-12, 13-14. Similarly, as noted in IID's lawsuit submittals, Mr. Johnson and his office have repeatedly assumed IID should reduce its use, but not CVWD or MWD. As to the issue of IID's reasonable/beneficial use, IID does not believe Mr. Johnson can be objective. He has prejudged that IID's water use is wasteful even before reading IID's submissions in this *de novo* Part 417 process. Mr. Johnson should not preside over the *de novo* Part 417 proceeding to determine IID's reasonable/beneficial use, when he has already decided the outcome.

The bias of Interior, including Mr. Johnson and his staff, was clearly revealed when Interior actively collaborated with MWD against IID last year, concurrently with supposed Part 417 consultations with IID. MWD has been an active antagonist to IID

because as a junior appropriator, MWD will receive free additional water if IID's deliveries are significantly reduced. Mr. Johnson and his staff participated in a strategy to cut back IID's water allocation, they solicited approval of their strategy from MWD, they studied only IID water use, and they kept such studies secret from IID, but shared them with MWD to utilize in a coordinated attack on IID.

As stated more fully in the Affidavit of Jesse Silva (IID's General Manager; Item 1-19) regarding recusal, Mr. Silva and IID staff have spoken with Mr. Johnson and his staff on many occasions. Mr. Johnson has repeatedly made it clear that he has already decided IID does not put its water to reasonable beneficial use. Mr. Johnson also, historically and currently, has focused solely on IID's water use, while failing to study the water use of others, such as MWD and CVWD. He has freely opined over many years that IID could stop wasting water easily and inexpensively, even though no process establishing such fact has ever been concluded.

Attached as Exhibit "B" to the Silva Affidavit Re Recusal is proof of Interior's collaboration with MWD under Mr. Johnson. The first page consists of two e-mails. Reading from the bottom up, this e-mail is from Ruth Thayer, an Interior employee under Mr. Johnson who met with IID in the Part 417 meeting of November 14, 2002. She is writing to Jayne Harkins, the Area Manager for Interior's Boulder Canyon Operations Office. Ms. Harkins also works under Mr. Johnson. Ms. Thayer writes that she finished her "edits on my notes from yesterday," but that Steve Jones warned her that if she sent them to Ms. Harkins

electronically, they could become public documents and "IID will be able to get them." The strategy to preclude IID consultation on these studies is apparent.

In response, Ms. Harkins wrote back on December 4 with advice on how to prevent disclosure: flag these "DRAFT - Not For Release" on every page. Her advice was followed.

These secret meeting notes reveal that Interior and MWD held a full-day meeting on November 20, just six days after Interior "consulted" with IID, to develop a roadmap for a joint effort to take IID's water. A secret meeting between Mr. Johnson and MWD is noted at the top of Administrative Record p. 201 of Exhibit "B." Mr. Johnson's staff was present at the full meeting. The first page references a suggestion by MWD to ignore California's interests:

> MWD wants Colorado River issues managed as federal rather than state. Reason is because CA has strong public interest views, public trust doctrine. This could impact the management at the Salton Sea.

Exh. "B," Admin Record p. 201. (Interior adopted this strategy. See, for example, Fed. Surreply, pp. 3(22) - 4(7)).

The meeting notes also confirm plans for a joint federal/MWD coordinated attack on IID:

> Today's meeting -- technical issues --
> -- How to ***bullet proof*** a reasonable use action
> -- How to support BOR action
> -- Proposing another meeting

Exh. "B," Admin. Record p.201. (Emphasis added.)

Mr. Johnson and his staff collaborated with MWD so that water could be taken from IID and given to MWD. The rest of the

memo details the collaboration. This memo clearly shows the bias of Mr. Johnson and his staff as to IID's water use.

In addition, although Mr. Johnson and Interior have conducted no detailed studies of other districts' water use, such as for MWD and CVWD, Mr. Johnson has obviously commissioned and relied on several studies of IID's water use, all of which have been negative. Mr. Johnson and his staff have represented to IID and its staff that they "stand behind" these negative reports.

By affirmatively stating that he "stands behind" these reports, and without studying others' water use in a comparable manner, Mr. Johnson has unequivocally singled out IID as a target regarding its water use. When IID has asked to see studies on other districts' water use, Mr. Johnson, his staff and consultants have repeatedly claimed to IID that none are "available," or have admitted that there are no other such studies. For example, in 2002 when IID staff asked Interior consultant Gary Parker about studies of other districts' water use, he replied that Reclamation was "studying IID first." After IID submitted its water conservation report to Reclamation, IID staff asked if they could see other such reports by MWD and CVWD, among others, and were told by Mr. Johnson's staff that such reports were "not available." Further, in the last Part 417 meeting with Steve Jones, who works at Reclamation under Mr. Johnson, IID staff asked Mr. Jones about studies of others' water use, to which Mr. Jones replied that "We do not have the results on others' use yet."

Additionally, and as a separate but related ground for disqualification, Mr. Johnson has actively participated in

settlement discussions regarding disputes between IID, MWD and CVWD concerning a Quantification Settlement Agreement ("QSA"). Mr. Johnson was at almost every QSA meeting, and he usually brought someone from his office with him.

Mr. Johnson essentially attempted to play the role of a mediator between the parties, and was privy to information released by IID for settlement purposes only. Any statements or concessions made by IID during the QSA settlement discussions were made solely in an attempt to resolve the dispute, and are privileged. It would be wholly improper to now have Mr. Johnson preside over the *de novo* Part 417 proceeding after having played a Mediator's role in the QSA settlement negotiations.

On December 9, 2002, IID voted 3-2 against the QSA in its form on that date. A later revision was approved by IID on December 31, 2002. However, Mr. Johnson and his staff expressed frustration with IID regarding its QSA votes. Because of all the time Mr. Johnson, his staff, and the interested parties had put into the QSA, Mr. Johnson and others apparently felt that IID should have approved the QSA, regardless of its terms on December 9, 2002. Mr. Johnson's frustration at IID's decision reinforces the fact that he is not neutral or objective toward IID or its water use for purposes of the *de novo* Part 417 proceeding.

The law does not require IID to suffer a biased fact-finder who has prejudged this matter, particularly in light of the Court's "*de novo*" review requirement. Due process requires that an adjudicatory process be fair. Agency decisions require compliance with appropriate due process. Decision processes must

be impartial and without prejudgment. Amos Treat & Co. v. Securities Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962) provides a concise explanation:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.
>
> At the very least, quasi-judicial proceedings entail a fair trial. As the Supreme Court has said in other context: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an actual absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." . . .
>
> Stated otherwise with respect to agency adjudicatory proceedings, due process might be said to mean at least "fair play."
>
> One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal.

Id. at 263-264. (Emphasis added.)

The above rules particularly apply to cases where important decisions affecting many persons are being decided, such as is the case here:

> [A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness.

Id. at 267. See also Grolier Inc. v. F.T.C., 615 F.2d 1215, 1221 (9th Cir. 1980) (where Amos Treat was followed in the Ninth Circuit); American Cyanimid Co. v. F.T.C., 363 F.2d 757, 767 (6th Cir. 1966) ("Wherever there may be reasonable suspicion of unfairness, it is best to disqualify"); and Crager v. The United

States, 25 Cl.Ct. 400, 410 (1992) ("[The concept of a fair trial] extends beyond the courts, to administrative agencies and tribunals as well, where bias in a decision maker is to be considered 'constitutionally unacceptable.'").

Part 417 procedures require actual consultation with a full and complete sharing of information. It is ostensibly a quasi-adjudicative process, since it purports to allow for factual review, factual determination, and then objection and appeal.[7] 43 C.F.R. Parts 417.2 and 417.3.

The conduct of Interior must be judged against due process standards for a quasi-adjudicatory process. The current framework fails that test.

2. This *De Novo* Part 417 Review Cannot Ignore State Law

In addition to due process issues and non-compliance with the facial requirements of Part 417, and despite IID's repeated requests Interior has refused to acknowledge the proper role of state law in this proceeding. In fact, Interior stated in pleadings in the lawsuit, "federal law and federal contracts control the allocation, distribution and use of Colorado River water to the exclusion of state law." Fed. Supp. Brief, p. 8.

This, in spite of pronouncements by Secretary Norton that water allocations in the states are state issues, and new Interior documents that trumpet that cooperative federalism (such

[7] This is one reason why IID believes that such regulation is invalid. A party to a contract should not be able to adjudicate its own and the other party's performance under the contract particularly when the express contractual language is to the contrary. The 1932 Contract, Article 27, provides for Court resolution of contract disputes.

as the "Water 2025" program). Further, as noted in IID's lawsuit submittals, Interior has often historically admitted the role of State law. However, now Interior has doggedly refused to affirm that it will consider state beneficial use laws that are not in conflict with federal law in this *de novo* Part 417 process.

Interior is required to follow state beneficial use law that is not in conflict with federal law. IID's 1932 Contract references a "reasonable beneficial use" limitation. But, no definition is present anywhere. The case law is extensive and clear that, notwithstanding the Secretary's role in Colorado River operations and interstate issues related thereto, state law is looked to in order to construe what "reasonable beneficial use" means.[8]

In California v. United States, 438 U.S. 645, 653 (1978), the Supreme Court stated:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

The Court also stated at 664:

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[8] U.S. Attorney Macfarlane's letter of May 23, 2003, reminded IID that in IID's 1990 Writ Petition in the Imperial Irrigation Dist. v. State Water Resources Control Board case, IID argued for the application of federal law. Such recitations ignore the following: (1) IID lost that Petition, so the benefit of citing a losing argument as support for the U.S.'s current position seems a bit unusual; and (2) failed legal arguments from decades ago that were rejected by the courts mean nothing. Though the United States previously claimed that it had a right to enjoin newspapers from publishing studies in the infamous "Pentagon Papers" case (New York Times Co. v. United States, 403 U.S. 713 (1971)), IID would not suggest today that the United States takes such a position, especially after those claims were rejected by the courts.

> The projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water.

And finally at p. 675:

> The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

Of critical import for this Part 417 proceeding is that the Ninth Circuit has definitively held that reasonable use is governed by state law. In U.S. v. Alpine Land and Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983), the Ninth Circuit confirmed:

> While there were provisions of federal law which were intended to displace state law, such as the 160-acre limit at issue in United States v. Tulare Lake Canal Co., 667 F.2d 713 (1982), **beneficial use itself was intended to be governed by state law**.

(Emphasis added.) See also U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1223 (9th Cir. 1989) ("State law governs the validity of transfers of water rights"); U.S. v. State of Cal., State Water Resources, 694 F.2d 1171, 1177 (9th Cir. 1982) (state limitation on the federal management of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purpose with an important federal interest served by the Congressional scheme); Environmental Defense Fund v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 192 ("California may impose any condition not inconsistent with congressional directive . . . absent conflict

with congressional directive, state law must be complied with in the 'control, appropriation, use, or distribution of water'").

The obligation to use water only in a reasonably beneficial manner did not spring anew as a novel requirement of the BCPA. Water rights throughout the arid West have long been conditioned on beneficial use, predating the BCPA by many decades. For example, from the date of statehood in 1848, California has required appropriative water rights to be reasonably and beneficially used. California case law that predates the BCPA is replete with reasonable use requirements. For example, see Hill v. King (1857) 8 Cal. 336, 338; Van Bibber v. Hilton (1890) 84 Cal. 585, 588; and Williams v. Costa (1921) 52 Cal.App. 396, 404 . See also former California Civil Code § 1411 ("useful or beneficial purpose"), enacted in 1872 (and now Water Code

§ 1240). Similar laws in the other western states also predate the BCPA by many years.[9]

Any argument that federal law has totally preempted state beneficial use law is simply false. There is no conflict in the context of reasonable beneficial use. In other words, there is no federal preemption as to reasonable beneficial use because there is no state law regarding such use that is inconsistent with federal law.

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[9] **Arizona:** Gould v. Maricopa Canal Co., 8 Ariz. 429, 447 (1904) ("To perfect such an appropriation two things are essential, -- the ownership or possession of land, and the application thereon of public water to a beneficial use"). **Nevada:** Vansickle v. Haines, 7 Nev. 249, 270 (1872) ("The proposition . . . that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true . . . ."); Barnes v. Sabron, 10 Nev. 217, 233 (1875) (" . . the plaintiff . . . has the right to insist that the water flowing therein shall . . . be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use"). **Colorado:** Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882) ". . . we hold that . . . the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation"); Thomas v. Guiraud, 6 Colo. 530, 532 (1883) (" . . the doctrine of priority of right to water by priority of appropriation thereof for a beneficial purpose . . . is and always has been in force in this state"); Platte Water Co. v. Northern Colorado Irrigation Co., 12 Colo. 525, 531 (1889) ("It has been the settled doctrine of our courts that such appropriation, to be valid, must be manifested by the successful application of the water to the beneficial use . . . ."). **Utah:** Springville v. Fullmer, 7 Utah 450, 452 (1891) ("These sections gave the plaintiff authority to use all reasonable means to supply the people within its borders with water for all useful and beneficial purposes . . . ."); Hague v. Nephi Irrigation Co., 16 Utah 421, 429 (1898) ("Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose"). **Texas:** Motl v. Boyd, 116 Tex. 82, 125 (1926) ("The right to use the water is limited for the beneficial purposes . . . ."); McGhee Irrigating Ditch Co. v. Hudson, 85 Tex. 587, 589 (1893) (" . . the unappropriated waters . . . may be diverted from its natural channel for irrigation, domestic, and other beneficial uses . . . .").

When Arizona's pumping of Colorado River water into groundwater storage was at issue, the federal courts held that after contractual allocation had been made by the Secretary, use thereafter was to be governed by state law:

> The allocation and preferences given to CAP water seems to be within the exclusive province of the Secretary of the Interior; once the preferences are already established, the possible *uses* of that water are governed by state law. Consequently, the Secretary of the Interior is authorized to allocate CAP water to M & I users. Then M & I users may use their water for any use authorized by Arizona law, including recharge.

Central Arizona Irr. and Drainage Dist. v. Lujan, 764 F.Supp. 582, 591 (D.Az. 1991). (Italics in original; other emphasis added.)

The Ninth Circuit has expressly held that the requirements of federal reclamation law as to beneficial use are entirely consistent with California's state law to this effect:

> A basic provision of California water law requires that water be appropriated only for beneficial use. Cal. Const. Art. XIV, § 3. Far from being inconsistent, applicable federal law mandates that the "beneficial use" standard be met by uses of water in federal reclamation projects.

U.S. v. State of Cal., State Water Resources, 694 F.2d 1171, 1177-1178 (9th Cir. 1982).

The Ninth Circuit's decision in U.S. v. State of Cal., State Water Resources, 694 F.2d 1171 (9th Cir. 1982) stands as an exemplar for Interior here. The Court noted that when looking at preemption questions, one does not search for conflicts between state and federal law when they are not facially apparent:

> We are mindful, in deciding whether later federal law overrides inconsistent state law,

> that we may not seek out conflicts between state and federal regulation where none clearly exists.

Id. at 1176.

State law is only preempted when it conflicts with federal law. Id. at 1176-1177. The Ninth Circuit noted in U.S. v. State of Cal., State Water Resources that the federal government cannot simply trumpet sovereignty to the exclusion of all else: "The United States may not justify its demands simply as a raw exercise of superior authority." Id. at 1178.

The analysis by the Ninth Circuit mirrors that required by Interior in this case. In U.S. v. State of Cal., State Water Resources, the United States claimed that Congress had preempted state law. Id. at 1174. Interior argued that because the federal Flood Control Act generally addressed certain matters, that California could not place conditions on use related to those matters. Id. at 1173-1174. However, the Ninth Circuit disagreed, stating, "None of the conditions imposed by the Water Resources Control Board have been shown to be invalid." Id. at 1182.

One useful example from that case is the federal statute's requirements that the Secretary of the Army consider water storage for quality control. Id. at 1173, fn. 1, item "7." When the SWRCB imposed several water quality conditions, and the federal government objected that water quality issues had been preempted, the Ninth Circuit upheld the conditions on the basis that they actually furthered Congressional intent, denying the preemption argument. Id. at 1180-1181.

A similar situation exists here. Part 417 contains a non-exclusive list of factors to be considered in reaching reasonable beneficial use conclusions. If Interior looks for a conflict between Part 417 and state law on reasonable beneficial use, it will find none. Thus, Part 417's existence, just like the existence of the Secretary of the Army's authority, does not by itself preempt state law. The federal law would have to say something contradicted by state law for preemption to apply.

The above holdings are in accord with the states always having required that water be used in a reasonably beneficial manner. Thus, "supremacy" arguments about inconsistent "federal law" are irrelevant. No one disputes that the Secretary had the exclusive power to contract for Colorado River water allocations. However, once Secretarial power was exercised, and the allocation took place by signing contracts, then water use issues not in conflict with federal law, including reasonable beneficial use matters, remain subject to state law.

The Secretary's adoption of the Part 417 regulation is not contrary. The list of factors listed in Part 417 is expressly non-exclusive:

> The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as . . . .

43 C.F.R. Part 417.3.

Neither the Part 417 factors listed, nor additional factors not listed, make California law on the meaning of beneficial use inconsistent with Part 417. Furthermore, the beneficial use limitation in IID's contract existed for 40 years before Part 417

was adopted by the Secretary. Thus, under concepts of concurrent jurisdiction, Part 417's non-exclusive factors and state law beneficial-use factors must be considered.

California state law on reasonable beneficial use requires evaluation of the many factors discussed above. In contrast, Interior transmutes the Secretary's initial allocation powers precontract into a perpetual allocation power. Interior stated in the lawsuit:

> Annual determinations of water allocations are the manner in which the allocation and distribution of waters made available and delivered pursuant to federal law and federal contracts are carried out by the Secretary. To effectuate this process, Interior promulgated the Part 417 regulations.

Fed. Supp. Brief, p.10(13-15).

However, Part 417 relates solely to an evaluation of beneficial use. It is not a "reallocation" regulation. In contrast, by virtue of permanent contracts, the Secretary allocated Colorado River water on a permanent basis:

> Contracts respecting water for irrigation and domestic uses shall be for permanent service . . . .

43 U.S.C. § 617d.

> Congress intended the Secretary of the Interior, ***through his § 5 contracts***, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each state would get water.

Arizona v. California, 373 U.S. 546, 580 (1963). (Emphasis added.)

> With the Boulder Canyon Project Act, Congress thus authorized the Secretary to effect an apportionment ***through contracts*** for reclamation water.

City of El Paso v. Reynolds, 563 F.Supp. 379, 387 (D. New Mexico, 1983). (Emphasis added.)

Interior grounds its purported reallocation power under Part 417 in the general language of the Reclamation Act of 1902, allowing the Secretary to "perform any and all acts and to make such rules and regulations as may be necessary and proper . . . ." Fed. Supp. Brief, p.11(4-9). A reallocation power is not found in this statute. In Goshen Irrigation Dist. v. Pathfinder Irrigation, 62 F.Supp.2d 1218 (D.Wyo. 1999), the Secretary attempted to effect a water reallocation under the claimed general authority to "do all things you need to do." The Court disagreed, stating it would be a violation of contract, and noted that per the Supreme Court's Arizona v. California decision, the Secretary had to follow his/her reclamation contracts:

> Thus, while the Secretary and Commissioner are empowered to perform any and all acts "necessary and proper for the purpose of carrying out the provisions of the Reclamation Act," the court does not find this includes the power to impose a pro rata division of water different from the pro rata division that is spelled out in the contract. *Cf. Arizona v. California* . . . .

Id. at 1250.

In Nevada v. U.S., 463 U.S. 110 (1983), Interior argued that it was free to reallocate water subject to a project water right from historic irrigation uses to other protected uses. The Court stated that this position "would do away with half a century of decided case law" relating to reclamation project water rights. Id. at 121. After quoting at length from its prior decisions in Ickes and Nebraska, the Court rejected Interior's claimed right

of reallocation, stating that "the Government is completely mistaken if it believes that the water rights . . . were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." Id. at 126.

A water reallocation from IID to junior rightholders MWD and CVWD, such as contemplated by Interior, would be a complete violation of longstanding deference to priority in California water law. In Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1243, the California Supreme Court held: "[W]ater right priority has long been the central principle in California water law." It ruled that the principle of reasonable and beneficial use is subject to "the rights of those with lawful priority to the water." Id. at 1250. It noted that the case adjudicated "rights among competing water users." Id. at 1251. It found no compelling authority that a court can "avoid prioritizing water rights" and, instead, allocate water based on supposed equitable principles. Id.

Indeed, in Arizona v. California, 460 U.S. 605 (1983) the U.S. Supreme Court discussed the priorities previously established on the Colorado River, itself. The Court stated that the doctrine of prior appropriation is largely a product of "the compelling need for certainty" in the holding and use of water

rights. Id. at 620.[10] The prior appropriation doctrine serves these interests by "ensuring" senior appropriators that "they will continue to enjoy use of the water." Id. at 620 n.11. The Court quoted a leading water law text for the following proposition: "'Where there is not enough for everyone, the rule of priority ensures that those who obtain rights will not have their water taken by others who start later.' [citation]" Id.

Thus, Part 417 is not, and cannot be, a reallocation regulation that Interior can use to redistribute water to those it wants to favor. Interior is bound by the 1932 Contract to provide IID with all the water IID orders, so long as such is for beneficial use.

D. Other Considerations

1. Other Contractors' Beneficial Use

Interior has chosen to micro-analyze IID's water use, while blissfully ignoring water use by other Colorado River Contractors. For example, CVWD's farmers are less efficient than those in IID, yet its water order was granted in full for 2003, prior to the preliminary injunction.

Before getting into the particulars of Interior's treatment of other Colorado River contractors, it is important to highlight

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[10] As the California Supreme Court discussed in In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 355, "uncertainty" is a major problem in contemporary California water rights law, which has three "pernicious effects." First, uncertainty "inhibits long range planning and investment for the development and use of waters of the stream system" Id. Second, it "fosters recurrent, costly and piecemeal litigation." Id. Third, uncertainty "impairs the state's administration of water rights." Id. at 356. A year after Long Valley, the California Legislature found and declared that "the efficient use of water requires certainty in the definition of property rights to the use of water." Cal. Water Code § 109(a).

this point: IID does not farm. IID provides water to the end users, its farmers, businesses, and citizens in its service area. Thus, when someone claims that IID is "wasting" water, what they often mean is that they believe its farmers are not being efficient, as opposed to IID itself. This concept is important, because when pundits such as Interior tell IID that it can "dike" fields, or "hire more irrigators," or similar concepts, in fact it is telling IID that IID must so regulate its end users.

MWD and CVWD are in no different setting. Each is a water purveyor to end users in their service areas. However, when anyone questions, for example, the acts of MWD's member agencies, MWD responds with a "that's not us" attitude. But, MWD and CVWD also have the ability to regulate their end users. Further, each has significant opportunities for conservation and/or water demand reduction which Interior has ignored.

a. Interior Has Historically Ignored MWD, CVWD, And Other Colorado River Contractors

Despite the fact that agencies such as MWD and CVWD have just as much, or more, ability to regulate their end users as IID, Interior has "turned a blind eye" to their water usage. Interior has not engaged experts such as Dr. Jensen and Dr. Rhoades to perform multiple examinations of CVWD or MWD.

Interior claims that because California is limited to 4.4 MAF in 2003, it is justified in applying "higher standards" to IID's water use. If so, then where are the similar "higher standards" analyses for MWD, CVWD, and all other Colorado River contractors? There are none -- because Interior has chosen to isolate IID as a target, while ignoring everyone else (a

potential equal protection issue which will be addressed in judicial proceedings). In fact, after the Court issued its preliminary injunction Order, Interior quickly issued new order approval letters to MWD and CVWD without any review whatsoever.

b. MWD And CVWD Have Ample Opportunity To Conserve Water And/Or Reduce Their Water Demand

Though Interior seems obsessed with IID's water use, to the exclusion of every other Colorado River contractor, in fact CVWD and MWD have greater conservation/demand reduction opportunities than IID.[11]

MWD:

Had Interior bothered to engage experts to review and study MWD, it would have discovered a substantial opportunity to reduce demand and conserve water. Dr. Michael Hanemann, an accomplished scholar who is the Chancellor's Professor of Agricultural and Resource Economics at UC Berkeley, reports that there is much more that MWD can do. (Item 1-28).

For example, of the total 9.6 MAF of water use in Southern California in 1995, about 1.893 MAF (28%) was used to irrigate urban landscapes. This is a huge amount of water for outdoor irrigation which is largely unregulated. Simply regulating the type of turf used in lawns is a potentially fruitful area for conservation. A paper attached to Dr. Hanemann's report, "Irrigation of Turfgrass Below Replacement of Evapotranspiration

[11] By focusing on MWD and CVWD, IID does not mean to imply that all other Colorado River users are properly using water. However, the time constraints imposed by Interior necessitate a narrowing of focus to MWD and CVWD.

As A Means Of Water Conservation: Determining Crop Coefficient Of Turfgrasses," notes on page 361 that there is a potential 50% savings of water in urban Southern California with use of the proper grasses.

Dr. Hanemann points out that the urban agencies' current efforts aimed at improving urban water use efficiency in California are targeted too narrowly at indoor residential use and, most specifically, at residential water use for toilets and showers, while ignoring (purposefully) outdoor irrigation regulation. None of the Best Management Practices (BMPs) for Urban Water Conservation administered by the California Urban Water Conservation Council (CUWCC) cover outdoor landscape irrigation by commercial users. Dr. Hanemann notes that with the current BMP system, there is an over-allocation of conservation funds to toilets and shower heads, and an under-allocation to other residential indoor uses and to outdoor use, both residential and non-residential.

This is not coincidental or through oversight. Dr. Hanemann, a first-hand participant in what became the BMP process, tells the intriguing story of how parties, including MWD, intentionally sidetracked the State Water Resources Control Board so that the ultimate BMP process basically ignored outdoor water use.

In 1988 (shortly after review of IID's water use by the SWRCB) there was a move by the SWRCB to impose something like a water duty for the urban water agencies that divert water from the San Francisco Bay/Delta, but it was quickly abandoned. It occurred in the context of the SWRCB's Bay/Delta Hearing Process.

Dr. Hanemann served as the SWRCB's economic staff for the hearings from their inception in July 1987 through the fall of 1989. In this capacity, he helped to write the Draft SWRCB Staff Report which was issued in November 1988. One of the main areas that he covered for the SWRCB was urban water use. The Staff Report contained a specific, quantitative assessment of reasonable urban water use by SWP Contractors in Southern California - essentially DWR's South Coast and Colorado River hydrologic regions - and the details were elaborated in Hanemann and Dale (1988). That analysis identified specific conservation practices that would be reasonable to require of urban water agencies such as MWD. Based on these conservation practices, the Staff Report set forth specific quantitative targets for reasonable urban water use tailored to the particular circumstances of each major water supplier or group of suppliers and broken down by broad end use (residential use and commercial use, both broken down by indoor and outdoor, industrial use, and other uses).

MWD strongly criticized the Staff Report when it was released. Its lobbying with others in opposition induced the SWRCB Chair, who had specifically requested the staff to pursue this water duty approach, to abandon it. In particular, urban water users persuaded the SWRCB to accede to an alternative approach, which became the BMP Process. They complained that the SWRCB Staff Report held them to specific quantitative targets for urban water use and conservation which they felt they might not be able to meet. Instead, they offered to make a good faith effort to promote certain conservation practices (some but not

all of those identified in the SWRCB Staff report) in return for not being held to a specific quantitative target for water use. This became the BMP Process.

Dr. Hanemann also participated in the negotiations that led to the signing of the Memorandum of Understanding (MOU) on Urban Water Conservation in 1991, first as SWRCB staff and later as an independent public member. His experience with these negotiations is that the major urban water agencies had an effective veto power over what ended up in the MOU. Only BMPs that the major urban water agencies were already implementing, or were willing to implement, were admitted to the list of BMPs that became mandatory for water supplier signatories of the MOU. Anything else would be placed on a secondary list of "Potential BMPs" that would be considered by the California Urban Water Conservation Council for inclusion on the mandatory BMP list at some later date.

The BMP negotiation process was an exercise in self-regulation by the major urban water supply agencies. Moreover, rather than providing a completely balanced coverage of all components of urban water use, or focusing on all those components which offered the most cost-effective savings, it addressed those components which were already receiving attention from the urban water industry. For example, there was reluctance to mount a strong conservation effort targeted specifically at outdoor residential use or new construction.

There were some small changes to the BMP list in February 1993 and March 1994, and there were more substantial changes in September 1997 that went into effect in July 1998. The

alterations, particularly those in 1997, exhibit a distinct pattern. They significantly de-emphasize landscape irrigation. To a lesser extent, they also de-emphasize commercial and institutional water use. The focus is increasingly narrowed to residential indoor use. The specific requirements to audit large users in various categories are also relaxed. Dr. Hanemann notes that the changes represent a narrowing of vision and a lessening of commitment to improving urban water use efficiency.

Additionally, there has been little progress in moving the Potential BMPs from their nascent status to full implementation. While the new BMP # 6, rebates for high-efficiency washing machines, is certainly consistent with the spirit of Potential BMP # 1, it hardly encompasses the full range of activities originally envisioned under that Potential BMP. In the 11 years since the MOU was signed, none of the original Potential BMPs successfully migrated to the required BMP list, and no new item has been added to the Potential BMP list. The process appears to be in stasis.

Additionally, even signing the MOU on Urban Water Conservation is voluntary, not mandatory, for an urban water agency. Not all of the urban water agencies have signed; several of the non-signatories are Southern California water agencies served by MWD. MWD has not compelled them to join the BMP process.

Further, while an urban water supplier that has signed the MOU is required to submit an annual report to CUWCC describing its compliance status with the BMPs, not all signatories are yet in full compliance with all BMPs. In some cases where they are

in compliance, there is latitude in the assessment of this compliance.

Thus, when faced with the SWRCB's authority that might impose limits upon them, the urban water agencies (headed by MWD) negotiated a different process, one which has been significantly weakened over time. The result is an urban water conservation process which is skewed away from areas the urban agencies do not want to address (such as outdoor landscaping), and towards those areas they want to deal with (i.e., low-flush toilets). Further, MWD has allowed some of its member agencies to stay out of the BMP process altogether.

Can an agency such as MWD do much better? Of course. Not only can it regulate (just as it demands IID do), but it also has the financial ability to act. The total spending by MWD in 2000 in support of urban BMPs was $14.9 million, yet that is very small in relation to MWD's unrestricted reserves, which currently amount to $368.1 million. MWD's conservation efforts, much touted by MWD, actually amount to only about 1% of MWD's $1.3 billion annual 2001/02 budget.

Interior has, of course, totally ignored all of the above issues. MWD's water order has been approved every year prior to 2003, with no conservation opportunity scrutiny, no requirements that MWD start regulating its end users' outdoor landscaping, or even requiring rogue member agencies to sign the MOU. While singlemindedly attacking IID's alfalfa and "low value" crops, Interior allows urban Southern California to fill its pools, water lush lawns, and frolic in water amusement parks. IID's farmers should not be an isolated target of Interior.

CVWD:

As noted in detail in the lawsuit pleadings, CVWD's irrigation efficiency is below that of IID's, yet Interior targets IID, apparently because its water right is larger and thus makes for a more politically inviting target for MWD (who, the documents clearly show, is the real co-conspirator with Interior). However, by ignoring CVWD's lower irrigation efficiency, and its extensive use of water for golf courses and other outdoor landscaping in the desert, Interior is applying an unfair dual standard.

IID's expert, NRCE, has testified that IID has an on-farm irrigation efficiency of about 83%. Paid by Interior and MWD, Dr. Rhoades takes IID to task for what he claims is efficiency of 77% (Rhoades Decl. for Federal Defendants, ¶ 34), and he cites the Bureau's Marvin Jensen, who says IID's efficiency is 78%. Interior presented these numbers as inefficiency.

However, what is CVWD's irrigation efficiency?: *70%*, and CVWD hopes to reach *75%* by the year 2015. This amazing fact is stated in CVWD's Final Water Management Plan. Note that this study, *published by CVWD itself*, just came out in September of 2002. It states, on page 23 (emphasis added.):

> As presented in Table 2, the goal is to reduce agricultural demand for crop irrigation [in CVWD] by approximately 7 percent by 2015. This corresponds to an increase in irrigation efficiency from 70 to 75 percent.

Thus, IID, as admitted by MWD's own expert, is already ahead of where CVWD hopes to be in 2015. The same factual statement is made by CVWD in its Final Program Environmental Impact Report

issued in September of 2002, on page 3-8, citing its expert, Lord. Page 3-8 states, "Water demand was computed assuming a District-wide irrigation efficiency of 70%. Subsequent on-farm investigations have confirmed this estimate of efficiency. (Lord 1999)."

If IID is irrigating, per the federal government and MWD's expert accusations, at 77-78% on-farm efficiency, how can IID be "wasting" water when CVWD, who is significantly less efficient by even its own admission, is just up the road from IID, and has a lower priority is less efficient?

IID does not have the groundwater resources that CVWD possesses. IID farmers rely virtually 100% on IID's Colorado River deliveries. However, CVWD's own General Manager's Declaration in the lawsuit states that in addition to the Colorado River water CVWD receives, its farmers (not CVWD itself) also use over 100,000 AF of high quality, low salinity pumped groundwater for irrigation. Robbins Decl., ¶ 56. These numbers are probably low, since other CVWD sources use higher figures. (See NRCE CVWD report, Item 1-4). When coupled with the prior CVWD approved consumptive use amount of 347,000 AF from the Colorado River, this gives CVWD at least 447,000 acre feet of water for 62,126 irrigated acres, a 7.20 acre-foot "water duty" under the Bureau's prior methodology (447,000 AF of water divided by 62,126 acres). In other words, Interior claimed that CVWD had

a "reasonable" use of water at 7.20 AF per acre,[12] but IID was "wasting" water at anything over 6.13 AF per acre.

Additionally, CVWD's drainage to the Salton Sea is ignored by Interior, though theoretically it would have potential for re-use (after treatment).

Interior's refusal to treat CVWD the same way it treats IID was evident in December of 2002, when Assistant Secretary and Defendant Bennett Raley came to an IID open Board meeting to answer questions, and IID's General Manager (Jesse Silva) was in attendance. One member of the audience asked Mr. Raley, "Why isn't the federal government looking at Coachella and Met's use of water?" His response was, "No one has asked us." This response shows two things: (1) no use analysis of CVWD or MWD has been done by the federal government, yet their water orders were granted; and (2) the federal government does not believe its job is to review the use of any users other than IID.

c. MWD's Authority To Regulate

Interior wants IID to regulate its end users, but has not applied the same standards to MWD and CVWD. Can those agencies regulate their end users? Yes. It is worth briefly discussing their authority to regulate in this submittal, since Interior most likely has never reviewed it.

MWD, in pursuit of its lawful purposes and objectives, has the general power to regulate its member agencies, and to require them to be more efficient. Evidence of such power is contained

[12] This is using CVWD and Interior's own figures. IID believes CVWD irrigates with closer to 150,000 AF of groundwater, not 100,000. Even Mr. Robbins states that it is "more than 100,000." Robbins Decl., ¶ 56.

in MWD's own internal Administrative Code and the California Water Code, programs implemented by MWD, and MWD's new rate structure and the burdens it places on its the member agencies.

In 1928, the California Legislature created MWD. MWD is incorporated under the Metropolitan Water District Act.[13] MWD is a consortium of 26 cities and water districts that provides water to nearly 18 million people in parts of Los Angeles, Orange, San Diego, Riverside, San Bernardino and Ventura counties. MWD supplies its member agencies with treated and untreated water at wholesale prices. The member agencies and various subagencies combine water received from MWD with other water supplies for delivery to their customers; MWD does not serve retail customers. As a metropolitan water district incorporated under the Metropolitan Water District Act, MWD was formed for the purpose of "developing, storing, and distributing water for domestic and municipal purposes." Cal. Water Code § 109-25 (West 1995). This purpose is consistent with MWD's stated mission to "provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way." Metropolitan Water District of Southern California at http://www.mwd.dst.ca.us/mwdh2o/pages/about/about01.html hereinafter "MWD website."

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[13] The original uncodified Metropolitan Water District Act was enacted in 1927. (Stats. 1927, ch. 429, § 2, 695.) It was repealed in 1969 (Stats. 1969, ch. 209, § 550, 540) and reenacted as uncodified sections 109-1 et seq. of the Water Code. (Stats. 1969, ch. 209, § 16, 493.) The uncodified act is found in 72B West's Annotated California Water Code-Appendix (1995) § 109-1 et seq. All further references to section 109-1 et seq. of the Water Code are to that appendix.

The California Water Code bestows upon MWD a wide spectrum of both general and specific powers that include, for example, the power to acquire, take, condemn and dispose of property, levy taxes, issue bonds, sell electric power at wholesale, contract with various parties, disseminate information, construct operate and maintain water facilities and other works, initiate lawsuits, borrow money, and provide and sell water. See §§ 109-120 - 109-160. MWD also possesses specific powers regarding its relationship with its member agencies. Section 109-130 grants MWD the authority to sell water to member agencies under rates set by MWD and delivered by facilities and works owned, operated and maintained by MWD. § 109-130. This section also provides that a district may acquire, construct or operate, control and use any and all works, facilities, and means necessary and convenient to the exercise of its powers and may do any and all things necessary or convenient to carry out any powers of the district. Id.

The above sections expressly grant MWD the ability to sell water, set conditions of sale to its member agencies, grant wide authority over property and other works, and take all necessary steps in pursuit of its powers. In addition, Section 109-120 provides that "a district may exercise the powers that are expressly granted by this act, together with such powers as are reasonably implied from the act and necessary and proper to carry out the *purposes* of the district." § 109-120 (emphasis added). This "implied powers" section dramatically extends and enhances the powers that Met is able to exert on its member agencies in

exercising the powers granted to it under the Metropolitan Water District Act by the California Legislature.

MWD's own website includes in its mission the mandate to carry out its powers "in an environmentally and economically responsible way." MWD website. More explicit support for this environmental purpose is found in the Water Conservation section of MWD's Administrative Code. Section 4210 provides that the MWD may "develop and implement such programs and enter into agreements with member public agencies …to make more *efficient* use of their water resources." MWD Admin. Code § 4210 (March 1987) (emphasis added) (relevant sections of the MWD Admin. Code are attached at Tab 2).

Of even greater significance, the California Legislature memorialized that cost-effective water conservation shall be of great importance to MWD. § 109-130.5. In 1999, the Water Code was amended to read that "it is the intent of the Legislature that [MWD] expand water conservation…[and] place increased emphasis on sustainable environmentally-sound and cost-effective water conservation, recycling, groundwater storage and replenishment measures." § 109-130.5(2)(b). The Legislature also explicitly gave the MWD Board the power to "modify any ongoing program as necessary to meet the above referenced emphasis." § 109-130.5(2)(c).

However, as noted in Dr. Hanemann's report, despite its ability to regulate, and some conservation efforts, MWD basically ignores outdoor landscaping, a major water user (most akin to irrigation), and has also allowed many member agencies to avoid agreeing to MWD's conservation program.

d. CVWD's Authority To Regulate

CVWD, in pursuit of its lawful purposes and objectives, also has the general power to regulate its customers' water use, and to require them to be more efficient as part of the greater power they have to provide and sell water. Evidence in the form of relevant California Water Code sections, programs implemented by CVWD, and ordinances previously enacted by CVWD that place burdens on its customers negate any argument to the contrary.

The Coachella Valley Water District was formed in January 1918 under the state Water Code provisions of the County Water District Act.[14] The district boundaries contain more than 640,000 acres, of which nearly 80,000 acres are farmland. Most of this land is in Riverside County, but the district also extends into Imperial and San Diego Counties. CVWD provides irrigation water and agricultural drainage, domestic (drinking) water service, sanitation and recycling, regional stormwater protection, "and-perhaps more importantly now than ever before-conservation." Coachella Valley Water District, hereinafter "CVWD website," at http://www.cvwd.org/manager.htm. In CVWD's own words, CVWD was formed "specifically to protect and conserve local water sources" and to "conserve Coachella Valley's water supply." Id. This purpose is consistent with CVWD's stated mission to "meet the water related needs of the people through dedicated employees providing high quality at a reasonable cost." Id. at http://www.cvwd.org/mission.htm.

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[14] The original County Water District Law was enacted in 1949. (Stats. 1949, ch. 274, § 1, 496.). The Law is found in 69A West's Annotated California Water Code (1995) § 30000 et seq. All further references to § 30000 et seq. of the Water Code are to that volume.

The California Water Code bestows upon CVWD a wide spectrum of both general and specific powers that include, for example, the power to acquire, take, condemn and dispose of property, levy taxes, issue bonds, sell electric power, contract with various parties, disseminate information, construct operate and maintain water facilities and other works, initiate lawsuits, borrow money, and provide and sell water. See §§ 31000-32200.

CVWD also possesses specific powers regarding its relationship with its consumers. The Water Code also authorizes CVWD to store water for the benefit of the district, appropriate, acquire, and sell water and water rights *for any useful purpose* under rates set by CVWD, and to deliver water by facilities and works operated and maintained by CVWD. §§ 31021, 31022, 31025 (emphasis added). Furthermore, the California Water Code grants CVWD the authority to do any act necessary to furnish sufficient water in the district for any present or future beneficial use and empowers CVWD to perform all acts necessary to carry out the provisions that give them general and specific powers under the Water Code. §§ 31020, 31001.

The above sections expressly grant CVWD the ability to sell water, set conditions of sale to its customers, grant wide authority over property and other works, and take all necessary steps in pursuit of these powers. In addition, Section 31000 provides that CVWD may "exercise the powers therein expressly granted or *necessarily implied* therefrom. § 31000 (emphasis added). This "implied powers" section dramatically extends and enhances the powers that CVWD is able to exert on its customers

in exercising the powers granted to it under the County Water District Law by the California Legislature.

Additional text in § 31021 is of even greater significance. This section specifically gives CVWD the right to "conserve water for future use" and "conserve water and water rights for any useful purpose." § 31021. The stated goal, indeed the very reason that CVWD was founded, is also memorialized in this section. That CVWD is authorized to take measures to conserve water seems uncontrovertible in light of the above evidence. After all ""[m]aking every drop count since 1918" isn't just a slogan, it's a way of life." CVWD website at http://www.cvwd.org/manager.htm.

More evidence of the power of CVWD to regulate its customers and water users is found in Section 31024 that provides that CVWD "may establish rules and regulations for the sale, distribution and use of water." § 31024. The Water Code also provides that the Board of CVWD is the governing body of the district, that the powers of CVWD shall be exercised by the Board of Directors, and that they may act by ordinances, resolutions or motions to execute the powers of the district. §§ 30575, 30576, 30523.

After the Court issued its preliminary injunction order, CVWD seemed to awake from its stupor, suddenly passing conservation restrictions on landscaping. See Items 20-124 through 20-127. Only because of the preliminary injunction, the CVWD Board of Directors passed an ordinance on March 25, 2003, that requires environmental compliance with regulations authored by CVWD. Effective June 1, 2003, new and refurbishing landscaping projects within CVWD boundaries will be required to

feature vegetation that uses 25 percent less water than what is currently permissible. Id.

Indeed, Interior should review Items 20-120 through 20-127 to see how both MWD and CVWD suddenly developed conservation consciousness not from any action by Interior, but solely because of Judge Whelan's order.

Thus, in summary, both MWD and CVWD can regulate the water use by their end users, just as is being demanded from IID. Interior needs to examine their water usages as well.

2. Environmental Issues

One of the most glaring omissions by Interior throughout this Part 417 process is its blissful denial of the environmental risks facing California produced by a major tailwater reduction by IID. In all the documentation submitted by Interior in the lawsuit, there was no reference to any environmental compliance by Interior. This, despite the fact that for a number of years Interior has been working hand-in-hand with IID and the other QSA parties to develop mitigation strategies for water reduction to the Salton Sea and other environmental concerns necessary to satisfy the U.S. Fish and Wildlife Service, a member agency of Interior.

The full impact of a major reduction in tailwater is addressed in the environmental documents which IID has submitted herewith, including but not limited to the Habitat Conservation Plan and the Environmental Impact Report submitted in the SWRCB proceeding. Obviously, if Interior mandated a 300,000 AF cutback, the environmental impacts specified in those documents explain the ramifications.

Without getting into too much detail,[15] the generalized problems with significant tailwater reduction by IID are:

- Reductions in Salton Sea inflow, with ensuing increased salinity in the Sea, and thus effects on federally and state protected endangered species and other species;
- Receding shoreline at the Salton Sea, with ensuing potential effects on air quality, recreation, etc.;
- Increased selenium levels in IID's drains (tailwater having a diluting effect that will be decreased), with ensuing effects on endangered species in the drains, as well as other species;
- Potential species, air quality, and water quality issues with taking fields out of production.

There are two overriding environmental procedural issues that must be considered prior to any sudden decision by Interior to cut IID's water supply on the basis of "waste": (1) Interior must first comply with the environmental laws, which includes the possible taking of endangered species, and it has not done so;

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[15] Since Interior helped develop the environmental mitigation plans for the proposed QSA transfer, it obviously is well aware of the environmental issues involved in significantly reducing IID's water supply. However, Interior apparently felt free to ignore such issues last December with the 1979 Decree order rejection letter, so IID again reminds Interior of such problems. For all the details of the environmental issues, the mitigation documentation submitted herewith, including the SWRCB hearing evidence, should be carefully considered by Interior.

and (2) Interior must, in its "waste" analysis, factor in IID's ability to have implemented the measures Interior claims should have been implemented voluntarily by IID already.

Before Interior takes any action to reduce IID's water deliveries, it needs to comply with various federal environmental laws, such as the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"); the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. ("ESA"); the Bald Eagle and Golden Eagle Protection Act, 16 U.S.C. §§ 668 et seq.; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Clean Air Act, 42 U.S.C. §§ 7401 et seq; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667[e]; Federal Water Project Recreation Act, 16 U.S.C. §§ 4601-12 et seq.; Executive Order 11990, Protection of Wetlands; Farmland Protection Policy Act, 7 U.S.C. §§ 4201 et seq.; National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.; Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa et seq.; Noise Control Act, 42 U.S.C. §§ 4901 et seq.; and Environmental Justice, Executive Order 12898 (1994).

Indeed, as noted by the State of California's briefing, Interior is required by federal law to consult with California before taking action, which it has not done.

Additionally, if Interior claims that IID is wasting water, Interior must demonstrate that there are reasonable water conservation measures which IID has failed to implement. The reasonableness of available conservation measures depends, in part, on their cost. See, for example, SWRCB Water Rights Decision 1600, 27 (1984) ("The determination of whether the cost

of a particular conservation measure is reasonable must be made with respect to the resources available for financing water conservation efforts as well as the value of the water which would be conserved"); SWRCB Water Rights Order 88-20, 36 (1988) ("The availability of financial resources for implementing proposed water conservation measures is a factor to be considered in evaluating the reasonableness of an existing method of diversion and use"); SWRCB Water Rights Order 88-20, 25 (1988) ("If the Board or a court were to attempt to formulate the details of an IID water conservation program as suggested by MWD, detailed analysis of the economic costs of such a program would be required"). As stated in Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 3 Cal.2d 489, 572:

> There can be no doubt that respondents as a group do not divert the water in the most scientific manner. There can be no doubt that in some cases, because of the paralleling of the ditches of some of the respondents, there is an uneconomic use of water. . .The courts cannot and, even if they had the power, should not compel these appropriators, many of whom, have been diverting water for over fifty years, at their expense, to build new systems of diversion.

One of the costs associated with the implementation of district-wide conservation measures can be the cost of environmental compliance. For example, if IID were to implement additional conservation measures, IID could be required to comply with various costly state environmental laws, possibly including: the California Environmental Quality Act, Public Resources Code §§ 21000 et seq. ("CEQA"); the California Endangered Species Act, California Fish and Game Code §§ 2050 et seq. ("CESA"); the

California Native Plant Protection Act, California Fish and Game Code §§ 1900 et seq; the Porter-Cologne Act, California Water Code §§ 13000 et seq.; California Fully Protected Wildlife Species Provisions, California Fish and Game Code §§ 3511, 4700, 5050, 5515; California Fish and Game Code §§ 1600; California Land Conservation Act of 1965 (Williamson Act), California Government Code §§ 51200 et seq.; and the State Scenic Highway Program, Streets and Highways Code § 260 et seq. In addition, to the extent that the implementation of additional conservation measures within IID involves federal action, compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"); the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. ("ESA"); the Bald Eagle and Golden Eagle Protection Act, 16 U.S.C. §§ 668 et seq.; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Clean Air Act, 42 U.S.C. §§ 7401 et seq; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667[e]; Federal Water Project Recreation Act, 16 U.S.C. §§ 4601-12 et seq.; Executive Order 11990, Protection of Wetlands; Farmland Protection Policy Act, 7 U.S.C. §§ 4201 et seq.; National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.; Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa et seq.; Noise Control Act, 42 U.S.C. §§ 4901 et seq.; and Environmental Justice, Executive Order 12898 (1994).

Therefore, the reasonableness of additional conservation measures proffered by Interior must include an analysis of the cost of compliance with these environmental laws. When Interior submitted reports to the Court that asserted IID could cheaply

conserve water, it totally ignored the environmental costs associated with tailwater reductions.[16] However, the costs of mitigating such environmental effects are large. Enclosed in IID's submittal (Item 1-8) is a report from Greystone Environmental Consultants in which they have calculated the QSA mitigation measures as if "year 1" involved an immediate 300,000 AF reduction. The costs in the first year alone for such mitigation are $121.17 per acre-foot. Interior cannot ignore the fact that such mitigation may be necessary when it analyzes whether or not IID should have regulated its farmers, and whether such conservation comes at "minimal" cost. As noted above, a key part of the "reasonable use" analysis is a financial review of what all the costs would be to change current practices. Such cost analysis must include the cost of mitigation measures, which to date Interior has simply ignored. Interior cannot claim IID has been "wasting" water without factoring in all the costs of such conservation: actual on-farm costs, environmental costs, farmer incentive and risk costs, and administrative costs.

3. Interior's Own Stated Goals Are Thwarted By Targeting IID

Interior has often stated, both in oral presentations and in publications, that it wants to work cooperatively with local agencies and the states in dealing with water issues, and that state law should be a major factor in deciding disputes. However, when it comes to dealing with IID, Interior uses a different set of rules.

[16] In addition to ignoring IID's costs to create, police, and administer such programs.

A very good example of the "PR" image that Interior tries to present to the public can be found in its new program, "*Water 2025: Preventing Crises and Conflict in the West*," submitted as Item 20-81. Here are a few notable statements from this program documentation (emphases added):

- "Water 2025 is a commitment by Interior to work with states, tribes, local governments, and the public to address water supply challenges in the West," Norton said. "<u>These decisions cannot and should not be driven from a federal level</u>."
- "Q. Will water 2025 be used to take water away from agriculture?"
  A. <u>No</u>."
- "Q. Will water 2025 transfer control over water from states to the federal government?
  A. <u>No</u>. Water 2025 can only work if it is implemented in accordance with <u>state law</u>."
- "Water 2025 does not pretend to be a complete solution to the complex water needs of the West. Principles of <u>federalism</u> and fiscal realities make it clear <u>these decisions cannot and should not be driven from the federal level</u>."

Interior has yet to provide IID with detailed recommendations as to what exact measures it thinks IID can implement, on what fields, on what crops, and how to run all the water deliveries for such methods. Is it fair, or in accord with

Interior's stated goals above to just hit IID with a heavy-handed water reduction? No. In fact, such a move runs directly contrary to all the stated goals of Interior, both now and in the past.

When IID tried to work with Interior and CVWD on a joint project in the early 1990's, it quickly became apparent that Interior was "stacking the deck" against IID and in favor of CVWD, so as to make a joke of the "cooperation" concept. See Declarations to this effect from Donald Cox and Timothy O'Halloran. IID has always been willing to work with Interior in a fair setting. However, to date, Interior has not appeared interested in doing anything objective, but rather in simply "dotting the i's and crossing the t's" for a predetermined result.

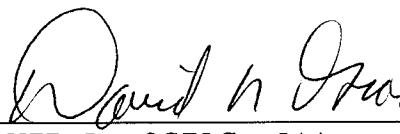
Interior needs to live up to its publicized comments, and honor state law and state interests, rather than dictating water allocations intra-California.

III. CONCLUSION

IID has serious doubts about the propriety of Interior's making a decision about IID's beneficial use. However, IID sincerely hopes that its fears are unfounded, and that Interior will objectively, and in a legitimately *de novo* manner, review the submittals and determine that IID's 2003 water order should be approved.

Dated: May 29, 2003

ALLEN MATKINS LECK GAMBLE & MALLORY LLP

By: 

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